FILE COPY

Office - Supreme Court, U. S
FILED
OCT 22 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

No. 230

NATURAL GAS PIPELINE COMPANY OF AMERICA,
APPELLANT,
vs.
JAMES M. SLATTERY, ANDREW OLSON, CHARLES E. BYRNE, ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF OF APPELLANT.

WILLIAM P. SIDLEY,
J. J. HEDRICK,
DONALD F. MCPHERSON,
DOUGLAS F. SMITH,
HOWARD NEITZERT,
Counsel for Appellant.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

	PAGE
ANALYSIS OF ARGUMENT	ii
TABLE OF CASES CITED	iii
STATUTES CITED	vii
OPINIONS DELIVERED IN THE COURT BELOW	ix
STATEMENT OF THE CASE	1
SPECIFICATION OF ERROR	19
SUMMARY OF ARGUMENT	21
ARGUMENT (See also Analysis of Argument)	
Part I—The Substantive Law	25
Part II—The Procedural Law	44
Conclusion	55
APPENDIX A	
Citation of Illinois Commerce Commission	59
Interlocutory order assailed in this case	62
APPENDIX B	
Sections of the Illinois Public Utilities Act involved in this case	68
APPENDIX C	
Distribution of the stock of the several corporations mentioned in this brief	76

ANALYSIS OF THE ARGUMENT.

(See also Summary of Argument, page 21.)

Part I—The Substantive Law

The order of the Illinois Commerce Commission is not authorized by Section 8a of the Illinois Public Utilities Act 25

The provisions of Section 8a of the Illinois Public Utilities Act as construed and relied upon by the Commission to sustain its order, are in conflict with the Fourteenth Amendment to the Federal Constitution 28

The order of the Illinois Commerce Commission, as applied to this appellant, is in contravention of the Commerce Clause of the Constitution of the United States 37

The court below erred if it sustained the order on the ground that it was a process in the nature of a subpoena 41

Part II—The Procedural Law

The denial of appellant's application for an interlocutory injunction was an improvident exercise of judicial discretion 44

An interlocutory injunction will be granted when the questions presented are grave and the injury to the moving party will be certain and irreparable if the application be denied, and final decree be in its favor, while if the injunction be granted the injury to the opposing party, even if final decree be in its favor, will be inconsiderable..... 45

(a) The questions presented in this case are of grave consequence to the appellant and of great public importance 47

(b) Injury to the appellant will be certain and irreparable if the application for interlocutory injunction is denied and final decree be in its favor 49

(c) Even if appellees be found entitled to a final decree in their favor upon the trial of the case upon its merits they will not suffer injury in any degree from the granting of the interlocutory injunction here sought... 50

Appellant is entitled to resort to the Federal Equity Courts for relief from the unconstitutional order of the Illinois Commerce Commission

The Federal Courts sitting in equity will enjoin threatened invasion of rights secured by the Federal Constitution 51

Because of penalties provided for disobedience of the orders of the Illinois Commerce Commission, it would be a violation of due process of law to deny the appellant the right to maintain this suit in equity..... 52

Appellant is not required to apply to the Illinois Commerce Commission for a modification of the Commission's order before seeking relief in the Federal Courts..... 53

CONCLUSION 55

TABLE OF CASES CITED.

(Page numbers in bold face type indicate pages of brief where case is discussed in some detail.)

	PAGE
Alabama v. United States, 279 U. S. 229, 230	46
Bandini Co. v. Superior Court, 284 U. S. 8, 18	33
Banton v. Belt Line Railway, 268 U. S. 413, 416	54
Barclay & Co. v. Edwards, 267 U. S. 442, 450	31
Brushaber v. Union Pacific R. R. Co., 240 U. S. 1, 24, 25	31
Buck Stove Co. v. Vickers, 226 U. S. 205	40
Cavanaugh v. Looney, 248 U. S. 453, 456	51
Chicago, Burlington & Quincy Railway v. Drainage Commissioners, 200 U. S. 561, 593	31
Chicago, Etc., Railway Co. v. Minnesota, 134 U. S. 418, 458	34, 36
Columbus Gas & Fuel Co. v. Public Utilities Comm'n. of Ohio, 292 U. S. 398, 414	29, 37
Dayton Power & Light Co. v. Public Utilities Comm'n. of Ohio, 292 U. S. 290	13
DeKalb-Ogle Telephone Co., In Re, Docket 3312, before Federal Communications Commission	32
East Ohio Gas Co. v. Tax Commission, 283 U. S. 465	38
Ellis v. Interstate Commerce Comm'n., 237 U. S. 434, 445	27
Ex Parte Young, 209 U. S. 123, 165	49, 52
Federal Trade Comm'n. v. American Tobacco Co., 264 U. S. 298, 306	27
Foster Packing Co. v. Haydel, 278 U. S. 1	46
Harriman v. Interstate Commerce Comm'n., 211 U. S. 407, 419, 420	27
Haskell v. Natural Gas Co., 224 U. S. 217	38

Heiner v. Donnan, 285 U. S. 312, 328, 329.....31, **33, 34, 35**
Heisler v. Thomas Colliery Co., 260 U. S. 245, 259.... 39
Hoeper v. Tax Commission, 284 U. S. 206, 215.....34, 35
In re DeKalb-Ogle Telephone Co., Docket 3312, before Federal Communications Commission 32
In re Intra State Telephone Co., Docket 3310, before Federal Communications Commission 32
International Text Book Co. v. Lynch, 218 U. S. 664.. 40
International Text Book Co. v. Pigg, 217 U. S. 91, 112 .....27, **39**
Intra State Telephone Co., In re, Docket 3310, before Federal Communications Commission 32
Manley v. State of Georgia, 279 U. S. 1, 6..... 33
Missouri v. Kansas Gas Co., 265 U. S. 298, 307, 308 .....15, 38, 39
Nebbia v. New York, 291 U. S. 502, 525..... 31
Norman v. Baltimore & Ohio R. R. Co., 294 U. S. 240, 311 31
Ohio Oil Co. v. Conway, 279 U. S. 813, 815 45
Oklahoma v. Kansas Natural Gas Co., 221 U. S. 299.. 38
Peples Gas Light and Coke Co. v. Slattery, 287 Ill. App. 379; 5 N. E. (2) 285 50
Peoples Gas Light and Coke Co. v. Slattery, Circuit Ct. of Cook Co., #36C9986 50
Peoples Gas Light and Coke Co., In the Matter of Its Petition for a Proposed Advance in Rates, Illinois Commerce Commission, Docket 24792 50
Prendergast v. New York Telephone Co., 262 U. S. 32, 48..... 53
Public Service Comm'n. et al. v. Missouri, ex rel. Cities Service Gas Co., 296 U. S. 657 40
Public Utilities Commission v. Landon, 249 U. S. 236, 245 38
Purchase of Stock of C. & A. R. R. by Rock Island, Finance Docket No. 2159, 72 I. C. C. Reports, 273 32

Railroad Retirement Board v. Alton, 295 U. S. 330, 347-348 31
Re Purchase of Stock of C. & A. R. R. Co. by Rock Island, Finance Docket #2159, 72 I. C. C. 273 32
Schlesinger v. Wisconsin, 270 U. S. 230, 239, 240 ..... 34, 35
Smith v. Illinois Bell Telephone Co., 282 U. S. 133, 152 ..... 29, 37
State v. Public Service Comm'n., 337 Mo. 809; 85 S. W. (2) 890 40
State Comm'n. v. Wichita Gas Co., 290 U. S. 561, 563 38
Sterling v. Constantine, 287 U. S. 378, 393 51
Terrace v. Thompson, 263 U. S. 197, 214 51
United Fuel Gas Co. v. Railroad Comm'n. of Kentucky, 278 U. S. 300 13
Wadley & Southern Ry. Co. v, Georgia, 235 U. S. 651, 662, 666 ..... 49, 53
Western & Atlantic Railroad v. Henderson, 279 U. S. 639, 642 33
Western Distributing Co. v. Public Service Comm'n. of Kansas, 285 U. S. 119, 124, 125, 126 ..... 4, 13, 21, 29, 32, 37, 44
Young, Ex Parte, 209 U. S. 123, 165 ..... 49, 52

STATUTES CITED.

CONSTITUTION OF THE UNITED STATES—

Commerce Clause—Article I, Section 6, Paragraph 3 ..... 19, **37**, 44

Fourteenth Amendment **28**, 31, 36, 44, 49, 52

ILLINOIS PUBLIC UTILITIES ACT (Ch. 111⅔ Ill. Rev. Stat. 1937)—

Inspection of books of local utility—power of Commission, Sec. 63 (Ch. 111⅔ Ill. Rev. Stat. 1937, 67) 43, **73**

Penalties for violation of orders of Commission, Secs. 76 and 77 (111⅔ Ill. Rev. Stat. 1937, 80, 81) 49, 52, **74**

Section 8a assailed in this case (111⅔ Ill. Rev. Stat. 1937, 8a) 3, **5**, 17, **25**, **28**, **30**, 35, **68**

Subpoena—Power of Commission, Secs. 60 and 62 (111⅔ Ill. Rev. Stat. 1937, 64, 66) 42, **70**

OTHER STATUTES—

Federal Public Utility Holding Company Act of 1935, Sec. 2 (15 U. S. C. A. 79b) 36

H. R. 6586, An Act to Regulate Interstate Pipeline Companies 15

Judicial Code, Sec. 266 (28 U. S. C. A. 380) 1, 52

ORDERS OF ADMINISTRATIVE TRIBUNALS—

Interlocutory order of Illinois Commerce Commission complained of in this case, Docket 25218, March 3, 1937 ..... 1, **8**, 10, 29, 37, 41, 48, 49, **62**

Citation of Illinois Commerce Commission directed to Chicago District Pipeline Company, Docket 25218, November 17, 1936 ..... 3, 9, 12, **59**

Order of Illinois Commerce Commission granting Chicago District Pipeline Company certificate of Convenience and Necessity, Docket 21256, April 26, 1933 ..... 15, 16

Order of the Illinois Commerce Commission suspending rates of the Chicago District Pipeline Company, Docket Nos. 21261, 2, 3 and 22386, 7, 8, June 16, 1933 11

Order of Illinois Commerce Commission authorizing Chicago District Pipeline Co. to enter into agreement of forbearance with appellant, Docket Nos. 21261, 2, 3 and 22386, 7, 8, December 31, 1935. 12

Order of Illinois Commerce Commission denying The Peoples Gas Light and Coke Company an increase in rates, Docket 24792, May 21, 1937 50

Order of the Federal Communications Commission, In re Dekalb-Ogle Telephone Co., Docket 3312, September 9, 1936 32

Order of the Federal Communications Commission, In re Intra State Telephone Co., Docket 3310, August 13, 1936 32

Order of Interstate Commerce Commission re Purchase of stock of C. & A. R. R. by Rock Island, Finance Docket 2159, 72 I. C. C. 273 32

OPINIONS DELIVERED IN THE COURT BELOW.

There is no official report of the opinions delivered in the court below. Soon after the court announced its decision to deny appellant's application for an interlocutory injunction, it mailed to counsel a memorandum opinion, which appears on pages 89 and 90 of the Record, and which was later filed by the court with its order denying appellant's application (R. 97). Thereafter, counsel for the appellees prepared and submitted to the court certain Findings of Fact and Conclusions of Law which the court also signed and filed with its order. These Findings of Fact and Conclusions of Law appear on pages 90 to 97, inclusive, of the Record.

The memorandum opinion of the court is referred to on pages 20, 41 and 42 of the brief.

The Findings of Fact and Conclusions of Law filed by the court are referred to on pages 13, 20 and 42 of the brief.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

No. 230

NATURAL GAS PIPELINE COMPANY OF AMERICA,
APPELLANT,

vs.

JAMES M. SLATTERY, ANDREW OLSON, CHARLES E. BYRNE, ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

This is an appeal under Section 266 of the Judicial Code* from an order of a three judge court, organized pursuant to the provisions of that section, denying appellant's application for an interlocutory injunction.

Suit was started in the District Court for the Northern District of Illinois to enjoin the enforcement of an order of the Illinois Commerce Commission†, hereinafter called

* 28 U. S. C. A. 380.

† The order of the Illinois Commerce Commission complained of in this cause is set out in Appendix A attached to this brief, pages 62 to 67; see also pages 47 to 51 of the Record.

the "Commission". The defendants and appellees are the persons constituting the Illinois Commerce Commission, and the Attorney General of the State of Illinois (R. 1). The appellant and plaintiff is a Delaware corporation organized in 1930 engaged in the sale, transportation and delivery of natural gas from the Panhandle area in Texas to industries and distributors of natural gas in the States of Kansas, Nebraska, Iowa and Illinois by means of a system of pipelines and pumping stations. Appellant's business and commerce is wholly interstate and national in character. Appellant is not qualified to do business in the State of Illinois, enjoys no franchise or statutory privilege from the State, and is not a public utility subject to the jurisdiction or control of the Illinois Commerce Commission (R. 1, 2).

Most of the gas brought into the State of Illinois by appellant is sold and delivered by it to Chicago District Pipeline Company near Joliet, Illinois. This company, in turn, sells, transports and delivers the gas, by a system of pipelines, to Western United Gas and Electric Company, Public Service Company of Northern Illinois, and The Peoples Gas Light and Coke Company, distributors of gas in and adjacent to the Chicago metropolitan area (R. 3. 45). The contract pursuant to which appellant sells gas to the Chicago District Pipeline Company was executed on July 25, 1931, and the contracts covering the resale of the gas by the latter to the distributing companies were executed shortly thereafter (R. 3, 10). The Chicago District Company, and the three distributing companies, are all public utilities engaged in local business in the State of Illinois.*

The order involved in this case was entered in a certain proceeding instituted by a citation of the Illinois Commerce Commission directing Chicago District Pipeline Company,

* For a detailed statement concerning the business and control of these corporations, see Appendix C, this brief pages 76 to 78.

to show cause why there should not be a reduction in rates charged by it for gas sold to the distributing companies in the State of Illinois*. The order directed to appellant was entered by the Commission after Chicago District Pipeline Company had made full response to the citation, closed its evidence, and rested its case. Appellant was not a party to that proceeding and received no notice or hearing before the entry of the order (R. 3, 4).

Summary Statement of Issues.

The stock of the Chicago District Company is owned by an investment company which owns 26.63 per cent of appellant's common stock (R. 4), and two of appellant's nine directors are also directors of the Chicago District Company (R. 6, 50). Section 8a of the Illinois Public Utilities Act†, defines corporations having a director or elective officer in common with a local public utility, or related to such utility by ten per cent common stock ownership, as "affiliated interests". The statute, as construed by the Commission, gives it jurisdiction over "affiliated interests" to require them to give the Commission access to their books and records, and to prepare and submit such statistical data and reports as the Commission may direct. Purporting to exercise the jurisdiction thus granted the Commission ordered the appellant to prepare and present certain reports for the stated purpose of enabling the Commission to pass judgment upon the reasonableness of the earnings received by appellant under its contract with the Chicago District Company, on the theory that ten per cent

* The citation of the Illinois Commerce Commission referred to above is included in Appendix A attached to this brief page 59; see also page 44, *et seq.*, of the Record.

† Section 8a of the Illinois Public Utilities Act (Ch. 111⅔ Ill. Rev. Stat. 1937, Sec. 8a) is set out in full in Appendix B, this brief page 68. This section was added by amendment to the Illinois Public Utilities Act in July, 1933, two years after the supply contract between appellant and the Chicago District Pipeline Company was executed.

common stock interest is the equivalent of common control of or the absence of arm's length bargaining between two corporations, regardless of what the actual facts may be.

The appellant asserts as a fact, alleges in its complaint (R. 4, 5), and is ready at the first opportunity to prove that the relationship between it and the Chicago District Company does not result in common control of the two companies, and did not, in any degree, or in any manner influence the actions or policies of either party to the contract or any of the terms or provisions thereof, that, on the contrary the contract was executed after the most rigid arm's length bargaining in an open competitive market.

Appellant contends: (1) that properly construed, the statute relied upon does not authorize the order complained of; (2) that if the statute has been properly construed by the Commission to give it jurisdiction over appellant to demand access to its books and records and the submission of reports, then the statute is unconstitutional.

The position of the Illinois Commerce Commission can best be illustrated by reference to the decision of this court in *Western Distributing Company* v. *Public Service Commission of Kansas,* 285 U. S. 119. In that case all of the stock of a local gas company and all of the stock of an interstate pipeline company supplying gas to the local distributor was owned by Cities Service Company. This Court held that those in control of the situation had combined the interstate carriage of gas with its local distribution, in what was in practical effect, one organization; that there was an absence of arm's length bargaining between the two corporate entities involved and all the elements which ordinarily go to fix market value, and that under such circumstances the Commission could require *the local utility*

under its jurisdiction to make a showing of the reasonableness of the profits of the affiliated interstate supply company, although it was specifically recognized that that might involve a presentation of evidence *which would not be required in the case of parties dealing at arm's length* and in the general and open market subject to the usual safeguards in bargaining competition. The Illinois Commerce Commission by its interpretation of Section 8a of the Public Utilities Act and the order here complained of, seeks to extend the doctrine laid down in the *Western Distributing Company Case* in two respects: (1) A ten per cent common stock interest or one or more directors in common is arbitrarily made the equivalent of common control and the absence of arm's length bargaining; (2) the burden is placed upon the interstate supply company rather than the local utility to show the reasonableness of its profits accruing from its contract with the local utility. Appellant contends that these innovations would deprive appellant of its property without due process of law, would deny it the equal protection of the laws and would impose an illegal burden on interstate commerce.

Analysis of Section 8a of the Public Utilities Act.

The order complained of purports to be based upon Section 8a of the Illinois Public Utilities Act*. That Act seeks to give the Commission certain jurisdiction over those coming within two broad classes of interests which have any transactions with local utilities. One class consists of those which may be determined *as a matter of fact, after investigation and hearing, to be actually exercising substantial influence over the policies and actions of the public*

* Section 8a of the Illinois Public Utilities Act (Ch. 111⅔ Ill. Rev. Stat. 1937, Sec. 8a) is set out in full in Appendix B, this brief page 68. This section was added by amendment to the Illinois Public Utilities Act in July, 1933, two years after the supply contract between appellant and the Chicago District Pipeline Company was executed.

utility. The statutory provisions descriptive of this class are as follows:

> SEC. 8a 2(g). "Every corporation or person which the Commission may determine as a matter of fact after investigation and hearing is actually exercising any substantial influence over the policies and actions of such public utility even though such influence is not based upon stock holding, stockholders, directors or officers to the extent specified in this section.
>
> (h) Every person or corporation who or which the Commission may determine as a matter of fact after investigation and hearing is actually exercising such substantial influence over the policies and actions of such public utility in conjunction with one or more other corporations or persons with which or whom they are related by ownership or blood relationship or by action in concert that together they are affiliated with such public utility within the meaning of this section even though no one of them alone is so affiliated".

The second class of interests, of which the statute seeks to give the State Commission jurisdiction, includes every corporation, ten per cent of whose capital stock is owned by a person or corporation owning ten per cent of the capital stock of such public utility, and every corporation which has one or more elective officers or directors in common with such public utility, regardless of whether or not it could be found "as a matter of fact after investigation and hearing" to be "actually exercising any substantial influence over the policies and actions of such public utility." The provisions of the section which creates this class are in part as follows:

> "SEC. 8a. * * * (c) Every corporation, ten per centum or more of whose voting capital stock is owned by any person or corporation owning ten per centum or more of the voting capital stock of such public utility, or by any person or corporation in any such chain of successive ownership of ten per centum or more of voting capital stock;
>
> "(f) Every corporation which has one or more elective officers or one or more directors in common with such public utility";

The interests coming within both these broad classes are defined alike as "affiliated interests". The jurisdiction granted by the statute runs against "affiliated interests" and the existence of a common stock interest in the amount of 10%, or a common director or elective officer, is thus made the exact equivalent of a determination *as a matter of fact after investigation and hearing that substantial influence over the policies and actions of the public utility is actually being exercised.*

For reasons satisfactory to it, the State Commission has elected to proceed under those provisions of Section 8a, quoted last above (R. 48, 49). Appellant is declared to be an affiliated interest of the Chicago District Company, not on the ground that it has been determined as a matter of fact, after investigation and hearing, to be actually exercising any substantial influence over the policies and actions of the Chicago District Company, but strictly in reliance upon common stock ownership and common directors sufficient to bring appellant within the arbitrary classification of the statute.

The jurisdiction given the Commission by Section 8a over both classes of affiliated interests, defined as stated above, is as follows:

> "(2) The commission shall have jurisdiction over affiliated interests having transactions, other than ownership of stock and receipt of dividends thereon, with public utilities, under the jurisdiction of the commission to the extent of access to all accounts and records of such affiliated interests relating to such transactions, including access to accounts and records of joint or general expenses, any portion of which may be applicable to such transactions; and to the extent of authority to require such reports with respect to such transactions to be submitted by such affiliated interests, as the commission may prescribe. * * *
>
> "(3) No management, construction, engineering, supply, financial or similar contract and no contract or

arrangement for the purchase, sale, lease or exchange of any property or for the furnishing of any service, property or thing, *hereafter made* with any affiliated interest, as hereinbefore defined, shall be effective unless it shall first have been filed with and approved by the Commission". (Italics ours.)

The Commission has interpreted paragraph (2) above, not as granting jurisdiction to obtain access to necessary information and records solely in aid of its duty under paragraph (3) to pass upon contracts, made after the enactment of the statute, but as an independent grant of power which may be exercised for such purposes as the Commission may deem appropriate, even if the contract between the affiliate and the public utility, like that here, was made prior to the enactment of the statute.

The Order of the Commission Assailed in This Cause.

The order of the Illinois Commerce Commission complained of by appellant provides, in part,* as follows:

"IT IS THEREFORE ORDERED by the Illinois Commerce Commission that Natural Gas Pipeline Company of America be, and the same is hereby, ordered and directed to file forthwith in this proceeding on or before the Fifteenth (15th) day of March, A. D. 1937, a true and accurate report as to the cost of the property of said Natural Gas Pipeline Company of America which is used in supplying natural gas to said Chicago District Pipeline Company and a statement of the income and expenses in connection with supplying gas to said Chicago District Pipeline Company, or to report to this Commission, in substitution thereof, a true and accurate statement as to the cost of all of its property or properties used by it in the business of transporting and selling natural gas, together with a statement as to the income and expenses for such operations.

"IT IS FURTHER ORDERED that the said Natural Gas Pipeline Company of America make available for the

* The order of the Illinois Commerce Commission is set out in Appendix A attached to this brief, pages 62 to 67. See also pages 47 *et seq.* of the Record.

examination of the Commission, or such of its officers, agents and employees as it may designate, all of its accounts and records relating to transactions between the said Natural Gas Pipeline Company of America and the said Chicago District Pipeline Company, including all accounts and records as to joint or several expenses, any portion of which may be applicable to said transactions".

Proceeding on the conclusive presumption, that the existence of a ten per cent common stock interest or a common director or elective officer is the equivalent of a finding, as a fact, after investigation and hearing, that substantial influence has actually been exercised over the policies and actions of the public utility, the State Commission proposes, in fixing the rates of the Chicago District Company, completely to disregard the contract price at which appellant sells gas to the Chicago District Company. The Commission asserts that it intends to determine from the statistical data which appellant is ordered to produce, and from its records, required to be made available, what the appellant should be permitted to receive from the sale of gas in interstate commerce and to permit the District Company to charge that amount as an operating expense rather than the contract price. Rates are then to be fixed for the Chicago District Company which will permit it to pay appellant not the contract price, if the Commission decides that that price exceeds what the Commission determines the appellant should earn, but only the latter. That this is the purpose of the Commission is shown by the citation to the Chicago District Pipeline Company* wherein the Commission declared that

> "A preliminary investigation of the records available to the Commission discloses that the charge for gas purchased by said Chicago District Pipeline Company from Natural Gas Pipeline Company of America is excessive and unreasonable;" (R. 45; this brief 60)

* See Appendix A, this brief page 59 and Record page 44.

The Commission also found in the order here challenged* that

> "It is now imperative that the Commission be advised as to the actual experiences of said Natural Gas Pipeline Company of America and Chicago District Pipeline Company in respect to the sale of gas to the latter by the former". (R. 48, 51; this brief 64, 66.)

In the answer of the appellees in this cause, appellees

> "Allege that in order that said Illinois Commerce Commission might make a complete and proper investigation and determination of the rates and operating expenses of The Peoples Gas Light and Coke Company and Chicago District Pipeline Company, *said Illinois Commerce Commission must determine the reasonableness of said payments by said The Peoples Gas Light and Coke Company to Chicago District Pipeline Company and by said Chicago District Pipeline Company to said plaintiff for natural gas purchased from it. Allege that such investigation and determination requires an investigation into the reasonableness of payments received by plaintiff herein by reason of the common interest hereinbefore alleged,* and Section 8a of the Public Utilities Act provides the lawful and proper means for securing the information necessary to make such determination". (R. 58; Par. 9.)
>
> "Admit that the Illinois Commerce Commission proposes to exercise jurisdiction and control over the plaintiff to the extent authorized in Section 8a of the Public Utilities Act in the manner provided for in the order of the Illinois Commerce Commission entered on March 3, 1937; admit that for the purpose of exercising such jurisdiction and control *the Illinois Commerce Commission proposes to inquire into the earnings, expenses and profits of the plaintiff, the value of its property and investments and the other business affairs of the plaintiff in so far as such earnings, expenses and profits and value of properties and investments and other business affairs relate to transactions with Chicago District Pipeline Company;* admit that it is the avowed intention of said Illinois Commerce Commission to treat the Chicago District Pipeline Com-

* This brief page 62; Record page 47.

pany and the Natural Gas Pipeline Company of America as affiliated corporations within the meaning of Section 8a of the Public Utilities Act". (R. 59, Par. 11.)

The ultimate purpose of the Commission is shown not only by the statements in its orders and answer, quoted above, but by the action already taken by it with reference to the rates of the Chicago District Pipeline Company. In 1933 the Commission reduced the rates of the Chicago District Pipeline Company (R. 48)*. As that company was organized by the distributing companies for the purpose of acting as an intermediary between them and appellant, and has no assets other than its pipelines, no reserve or financial responsibility and no source of income except from the sale of natural gas (R. 74, 75), it had no alternative other than proportionately to reduce its payments to appellant. In 1936 the operating expenses of the Chicago District Pipeline Company were $12,818,713.89, of which amount the sum of $12,362,268.15 was paid to Natural Gas Pipeline Company of America for gas purchased from appellant (R. 48). Any further reduction in the rates which Chicago District Pipeline Company may charge the distributing companies must, likewise, to the extent of the reduction, incapacitate the Chicago District Pipeline Company to perform its contract with appellant, and thus, in like amount, reduce the earnings of the appellant from its interstate business.

Following the action taken by the Commission in 1933, appellant adjusted its contract price to the ability of the District Company to pay under its lower basis of rates, and agreed with the District Company to forbear the collection of a part of the consideration provided by the original contract of July 25, 1931. This agreement of forbearance was dated December 31, 1935 (R. 36) and the Chicago District Pipeline Company was authorized to enter into it by an

* Illinois Commerce Commission Docket Numbers 21261, 2, 3 and 22386, 7, 8, June 16, 1933.

order of the Commission bearing like date.* By its citation to the Chicago District Pipeline Company, involved herein, (R. 44, this brief 59) the Commission, within eleven months of the date of that order, instituted proceedings further to incapacitate the Chicago District Pipeline Company to perform its contract with appellant.

These proceedings are particularly disturbing to appellant in that the Commission has no jurisdiction to *increase* appellant's interstate rates and obviously would not concern itself with appellant's needs in that connection.

Injury to Appellant Resulting From Compliance With the Order.

The injury of which the Court is asked to take cognizance is the damage which will ensue immediately upon compliance with the order already issued. Irreparable loss to the appellant will not await the final incidence of the rate order which the Commission is preparing to make against the Chicago District Company. Great and irremediable damage to appellant's business will be inflicted immediately by compliance with the Commission's interlocutory order. This damage includes the cash outlay involved in compliance, injury to appellant's credit and the effect thereof upon its cost of operation and program of expansion.

The avowed purpose of the Commission is to use the jurisdiction which it purports to have under Section 8a of the Act to require appellant to supply the data necessary to enable the Commission to determine what charges it believes the appellant should make for the gas sold by it in interstate commerce to the Chicago District Company.† This constitutes the establishment of a rate base for the sale of natural gas, and the Court is well aware of the vast

* Illinois Commerce Commission Docket Numbers 21261, 2, 3 and 22386, 7, 8, December 31, 1935.

† See this brief page 9 *et seq.*

amount of labor and expense which is necessarily involved in producing the statistical data essential to that purpose, as shown by its decisions in a series of cases dealing with this very subject.* As to the cash outlay involved in complying with the order of the Commission, it appears from the affidavit of its secretary, a graduate engineer, who made an investigation of the subject, that to produce the data required in the order (which is less extensive than that which the Commission asserts in its answer it intends to require) would cost many times the jurisdictional amount of $3,000 (R. 78). The court below found as a fact "that the matter in controversy, exclusive of interests and costs, exceeds the sum of Three Thousand Dollars ($3,000)". (R. 91).

The largest item of damage which would result to appellant from the enforcement of the order of the Illinois Commerce Commission would be the serious impairment, if not the destruction, of its credit. This is also the subject of affidavit proof (R. 78). It is a matter of common knowledge that appellant's business is a hazardous one and its principal asset, natural gas, a wasting one. The integrity of its large investment depends, among other factors,† upon the reliability of the estimates of its supplies of gas, its ability to protect against wastage, and to utilize the available supplies. It is obvious too, that the business would face complete destruction if natural gas fields were to be found nearer the consuming territory. If there is to be added to these factors the knowledge that each state in which appellant sells its product has the power to pass

* *Western Distrib'g. Co.* v. *Comm'n*, 285 U. S. 119; *United Fuel Gas Company, et al.* v. *Railroad Commission of Kentucky, et al.* 278 U. S. 300; *Dayton Power & Light Co.* v. *Public Utilities Commission of Ohio*, 292 U. S. 290.

† The natural gas industry is in its infancy. The life of pipelines and pumping stations has not been determined. The hazards from water and sour gas are as yet uncertain quantities. Most of the engineering problems involved in the transportation of gas for long distances by pipelines are still unsolved.

judgment on what appellant should earn and then take action to incapacitate the local utility to pay more than the amount so determined, the adverse effect upon the ability of appellant to finance its operations will be immediate and irreparable.

Appellant requires large sums of money annually for repairs, betterments, and for extensions of its lines and facilities (R. 78). There is an important potential market for natural gas in southern and eastern Wisconsin and in parts of northern Illinois and Indiana. Appellant is confident that natural gas can be supplied to the municipalities and to the many industries located in these areas, as it has been in Illinois, at considerably less cost than the price now paid for artificial gas. If appellant is to extend its services to these markets, as it hopes to do, it must be able to attract large sums of money for additional pipelines and pumping stations (R. 79). It is not denied that if appellant is forced to submit to this order of the Illinois Commerce Commission, which is the first step in the exercise of jurisdiction over appellant, the company will be unable to sell its proposed securities or borrow money to raise sums needed to finance these projects (R. 79). A certain class of investment funds will no longer remain available to this hazardous undertaking if the Public Service Commissions of the several States in which it sells its commodity in interstate commerce shall be held to have the power to pass judgment upon appellant's earnings, and, by control of the local utility to make that judgment effective. Such funds as may continue to be available to the enterprise can be obtained only at higher interest rates.

It should be emphasized that the injury which would be done to the credit of appellant will not await an exercise of the Commission's judgment on the propriety of the appellant's earnings, nor does it depend on whether that judgment shall prove to be adverse. The injury to credit

arises directly and immediately upon submission by the appellant to the Commission's order to produce the facts upon which the administrative judgment is to be exercised.

Reasons Why Arbitrary Action Against Appellant Is Unnecessary to the Proper Regulation of Intrastate Gas Rates.

(a) The appellant is not engaged in a common enterprise with the Chicago District Pipeline Company. Pioneering in the hazardous undertaking of bringing natural gas from Texas to the State of Illinois, the appellant had the right, in the absence of Federal regulation,* to offer its commodity for the price which it deemed proper. This right was subject to this practical limitation, however, that a price must be put upon the commodity which would be less than that of all competing fuels by a sufficient margin to make it necessary and desirable in the public interest that the local utilities be authorized by the State Commission to invest the large sums necessary to enable them to enter into the transaction. The price agreed to by the appellant in the contract of July 25, 1931, met that test and the Commission itself has so found.†

It was necessary under Illinois law for the Chicago District Company to secure from the Commission a certificate of public convenience and necessity authorizing it to construct and operate its pipelines and to carry on the busi-

* See, *Missouri* v. *Kansas Gas Co.* 265 U. S. 298, 308 and this brief pages 38 and 39. H. R. 6586, purporting to give the Federal Power Commission jurisdiction to regulate the rates of interstate pipeline companies, has been approved by the House of Representatives and has been reported favorably out of committee in the Senate and is now pending consideration by the Senate as a whole.

† The large savings which have been accrued to consumers in Chicago (R. 73) shows that as a matter of fact appellant offered its commodity to the Chicago District Pipeline Company at a price substantially below the basis indicated above in order to stimulate the use of the gas in the Chicago metropolitan area. Appellant sought to accomplish a capacity utilization of its line and thus to increase its net through a reduction in the unit price.

ness for which it was organized. It will be shown that in its decision granting the certificate on the ground that the project was in the public interest, the Commission found:

> "(13) that the three distributing utility companies can purchase natural gas from the Chicago District Pipeline Company at a lower rate per therm than they can manufacture or purchase coke-oven or other manufactured gas;
>
> "(14) that by reason of their being able to purchase natural gas from the Chicago District Pipeline Company cheaper than they can make or purchase coke-oven or other types of manufactured gas, the local distributing utilities are able to effect substantial operating economies;
>
> "(15) that because of the present and future operating economies that can be effected by the local distributing utilities purchasing natural gas from the Chicago District Pipeline Company, which is delivered and sold by them to the public for general use, either as straight natural gas or as a mixture of natural and manufactured gas, the transaction by the Chicago District Pipeline Company of the business of transporting and conveying natural gas, by pipe line, and selling and delivering the same for local distribution to the public for general use, tends to promote the public convenience and is reasonably necessary thereto;"*

Subsequently, and despite a precipitous rise in the general price level, the charges for gas made, respectively, by appellant to the Chicago District Company, and by the latter to the distributing companies, were reduced,† thus producing larger economies than those being realized at the time the Commission found the operations of the Chicago District Company to be in the public interest. Up to April 7, 1937, consumers of gas in the City of Chicago alone had

* Order of the Illinois Commerce Commission in Docket 21256, Chicago District Pipeline Company, In the matter of the application of said company for a certificate of public convenience and necessity to operate a gas utility, dated April 26, 1933.

† This reduction was made effective by an agreement to forbear the collection of approximately $1,000,000 per annum of the consideration specified in the supply contract of July 25, 1931. (R. 10, 36.)

benefited by rate reductions made possible by the provisions of said contract, in sums approximating $25,000,000 (R. 72, 73).

(b) The Commission insists that The Peoples Gas Light and Coke Company which distributes to the consumer the gas brought into the State by appellant, has the burden of proof of justifying any increase in its rates, and *it has recently denied an increase sought by that company.** The Commission has also ordered the Chicago District Company *to show cause why its rates* to The Peoples Gas Light and Coke Company *should not be reduced* (R. 44). The Commission's position that the burden is upon the local utility to justify any increase in rates, and to establish the unlawfulness of any proposed reduction in rates, deprives it of any reason or necessity for proceeding against appellant.

If the statutory presumption that the Chicago District Company and the appellant have the status of a common enterprise were true in fact, the Commission could obtain any desired information concerning that enterprise from the local utility. The fact that the presumption is false and arbitrary makes the required information unnecessary and the demand that it be furnished unlawful.

(c) The course was open to the Commission under the statute (Sec. 8a 2 g, h) to conduct an investigation and hearing to determine as a fact whether the appellant were actually exercising substantial influence over the policies and actions of the local utility. The failure to do so does not create the necessity arbitrarily to assume that relationship.

Under these circumstances appellant contends that the earnings and profits received by it under its contract with the Chicago District Company are not of lawful concern to the State Commission, and that if the statute be con-

* See this brief page 17.

strued to authorize the steps taken by the Commission to pass judgment upon appellant's earnings, it inflicts damage upon appellant without due process of law, denies it the equal protection of the laws, and imposes a direct and illegal burden on interstate commerce.

SPECIFICATION OF ERROR.

Appellant relies upon and urges each of the assigned errors listed in appellant's Assignment of Errors (R. 98 to 106). To repeat in this Brief each of the some fifty assignments would serve no useful purpose. Appellant's position may be summarized as follows:

1. Appellant specifies as error the finding of the court below that the order of the Commission is duly authorized by the provisions of Section 8a of the Illinois Public Utilities Act and the refusal of the court to find that the order is not authorized by and is in contravention of the provisions of Section 8a. (Assignments 10 to 14 inclusive, 50, 51.)

2. Appellant specifies as error the refusal of the court to find that Section 8a of the Illinois Public Utilities Act and the order of the Commission is in contravention of the Fourteenth Amendment to the Constitution of the United States and the finding of the court that said statute and order as applied to appellant do not deprive appellant of property without due process of law or deny to it equal protection of the laws. (Assignments 6, 7, 15, 35 and 50.)

3. Appellant specifies as error the finding of the court that the order of the Illinois Commerce Commission is not in contravention of the commerce clause of the Federal Constitution and the refusal of the court to find that the order as applied to appellant imposes a direct and illegal burden upon interstate commerce. (Assignments 6, 7, 34 and 50.)

4. Appellant specifies as error the finding of the court that there is no essential difference between the order of the Commission here complained of and a *subpoena duces tecum*, and the holding that the order of the Commission can

be sustained apart from Section 8a of the Illinois Public Utilities Act. (Assignments 17 to 23 inclusive, 33, 34.)

5. Appellant specifies as error the order of the court denying appellant's application for an interlocutory or preliminary injunction. (Assignments 1, 26 to 32 inclusive, 35, 37 and 50.)

6. Appellant specifies as error the finding of the court that appellant's remedy is not in the Federal Equity courts but is before the Illinois Commerce Commission. (Assignments 21 to 24 inclusive and 48.)

The specifications of error in paragraphs 4 and 6 above may charge the court below with a more precise determination of the issues referred to than are revealed by its memorandum opinion and findings of fact. The finding of the court, specified as error in paragraph 4 above, was definitely made in its memorandum of opinion (R. 89), but in its findings of fact and conclusions of law the court held that the order complained of "was duly authorized by the Public Utilities Act, and especially Section 8a thereof." (R. 97.) The error specified in paragraph 6 above relates to the ambiguous finding of the court in its memorandum opinion that,

> "It is true that a procedure by way of a subpoena duces tecum would be the more usual method, but there is no essential difference between the command of a subpoena duces tecum and the order of the Commission which is sought to be restrained. If the plaintiff preferred to produce its records only in response to a subpoena it might have pointed out this supposed defect of procedure to the Commission. Furthermore, if the order is somewhat broader than may be necessary, this, likewise, could have been pointed out to the Commission by way of motion." (R. 90).

SUMMARY OF ARGUMENT.

PART I—THE SUBSTANTIVE LAW.

Section 8a of the Illinois Public Utilities Act does not authorize the order of the Commission. The Commission has mistaken the purpose and scope of the statute. Section 8a, Paragraph 3, purports to give the Commission power to approve and disapprove contracts between affiliated interests *hereafter made*. The contract between appellant and the Chicago District Pipeline Company was executed prior to the enactment of the statute and the Commission has no jurisdiction over that contract. Paragraph 2, which grants the Commission power to investigate transactions between affiliated interests, and upon which the order of the Commission purports to be based, would constitute an unconstitutional delegation of power unless limited to the purposes specified in Paragraph 3. (Pages 25 to 28.)

The provisions of Section 8a of the Illinois Public Utilities Act, as construed and relied upon by the Commission to sustain its order, are in conflict with the Fourteenth Amendment. The Commission construes the statute to extend the *one organization rule* announced in *Western Distributing Co.* v. *Public Service Commission of Kansas*, 285 U. S. 119, to all cases in which two corporate entities involved are related by 10 per cent common stock ownership or one common director or elective officer. Ten per cent common stock ownership and a single common director or elective officer is made the full equivalent of common control and the absence of arm's length bargaining, regardless of what the facts may be. So construed, the statute is arbitrary and capricious in its selection of persons or corporations to be regulated and is unreasonably burdensome without real or substantial relationship to the objects sought to

be attained, and deprives appellant of property without due process of law and denies it the equal protection of the laws. A statute creating a presumption that is arbitrary, or that operates to deny a fair opportunity to repel it is void; legislative fiat may not take the place of fact in the judicial determination of issues. (Pages 28 to 36.)

The order of the Illinois Commerce Commission as applied to appellant imposes a direct and illegal burden upon interstate commerce. The Commission, by the construction which it places upon Section 8a of the Public Utilities Act in the order here complained of, attempts to extend the *one organization rule* by shifting the burden of establishing the reasonableness of the rates of the interstate company from the local utility to the supply company engaged exclusively in interstate commerce. The Commission has no jurisdiction over appellant or over its business. To require appellant to make its books accessible to the employees of the Commission and make the reports demanded by the order of the Commission would be a direct and illegal burden upon interstate commerce. (Pages 37 to 41.)

The order of the Commission is not a *subpoena duces tecum* nor is it in the nature of a *subpoena duces tecum* and cannot be sustained as such. There is no *subpoena* known to the law which is designed or competent to perform the function contemplated by the order of the Commission. The appellees have at no time taken the position that the order was issued as a *subpoena* but they have at all times insisted, and the order itself shows, that it is made in the exercise of a jurisdiction which Section 8a of the Public Utilities Act purports to grant to the Commission. Appellant and the local utility do not constitute *one organization,* that status cannot be created by legislative fiat, and the Commission may not employ the process of *subpoena* to investigate matters with which it has no lawful concern. (Pages 41 to 43.)

PART II—THE PROCEDURAL LAW.

The court erred in passing judgment upon the above questions without hearing the evidence bearing upon those issues. The court in effect decided this case on the merits without giving the appellant an opportunity to be heard. (Page 44.)

The court below should have granted appellant's application for an interlocutory injunction. This Court has held that an interlocutory injunction will be granted when the questions presented are grave and the injury to the moving party will be certain and irreparable if the application be denied, and final decree be in its favor, while if the injunction be granted the injury to the opposing party, even if final decree be in its favor, will be inconsiderable. Each of these conditions is satisfied by the facts of this case. (Pages 45 to 47.)

(a) The questions presented are of grave consequence to the appellant and of great public importance. (Pages 47 and 48.)

(b) Injury to the appellant will be certain and irreparable if the application for interlocutory injunction is denied and final decree be in its favor. (Page 49.)

(c) Even if appellees be found entitled to a final decree in their favor upon the trial of the case upon its merits they will not suffer injury in any degree from the granting of the interlocutory injunction here sought. (Pages 50 and 51.)

Appellant is entitled to resort to the Federal Equity Courts for relief from the unconstitutional order of the Illinois Commerce Commission. The Federal Courts sitting in equity will enjoin threatened invasion of rights secured by the Federal Constitution. Because of penalties

provided for disobedience of the orders of the Illinois Commerce Commission, it would be a violation of due process of law to deny appellant the right to maintain this suit in equity. Appellant is not required to apply to the Illinois Commerce Commission for a modification of the Commission's order before seeking relief in the Federal Courts. (Pages 51 to 54.)

ARGUMENT.

PART I.

THE SUBSTANTIVE LAW.

The Order of the Illinois Commerce Commission Is Not Authorized by Section 8a of the Illinois Public Utilities Act.

The Illinois Commerce Commission has mistaken the purpose and scope of Section 8a, the statute does not authorize the order in question, and the Commission has exceeded its jurisdiction.

Paragraph 1 of Section 8a gives the Commission jurisdiction to require the disclosure of the identity in respective interests of those owning any substantial interest in a public utility. Paragraph 2 gives the Commission access to accounts and records of affiliated interests and power to require reports with respect to transactions with such interests and defines the term "affiliated interests," but does not state the purpose for which this power of investigation is to be used. Paragraph 3 requires contracts with affiliated interests *"hereafter made"* to be submitted to the Commission for approval, and provides that contracts not approved by the Commission shall not be effective.* We think it clear that the purpose of Paragraphs 1 and 2 of the statute is to enable the Commission to dispatch the duties imposed upon it by Paragraph 3, that is, to apprise itself of the facts necessary to enable it to pass judgment upon, and approve or disapprove contracts with affiliated interests, *"hereafter made."*

* See Appendix B, page 68 *et seq.*

Appellant's contract with Chicago District Pipeline Company was executed in July, 1931 (R. 10). Section 8a of the Illinois Public Utilities Act was added to the Public Utility law by amendment in July, 1933. Section 8a expressly limits the power of the Commission over contracts to those executed subsequent to the passage of the law, and gives the Commission no jurisdiction over the supply contract between the appellant and the Chicago District Pipeline Company executed prior to its enactment. The Commission has been given no function to perform in respect to appellant's contract and is not authorized by the statute to require the production of the data demanded by its order. Nevertheless, by the construction of the Section which is made the basis of its order, the Commission would make the statute retroactive, giving it exactly the same practical effect in its application to contracts already made as to those "hereafter made" to which it is limited by express terms. The Commission has made it abundantly clear that the data sought will be used to disable the local utility from performing any contract which would be disapproved under Paragraph 3 if hereafter made.

The clear intent of the Act is that the grant of power in Paragraph 2 of Section 8a is to enable the Commission to perform the duty imposed upon it by Paragraph 3 with respect to contracts made *after* the enactment of the statute and not, in effect, practically to nullify that limitation. The power of investigation is not an end in itself; rather, it is a means to an end. It is settled law that power delegated to an administrative tribunal must be exercised pursuant to prescribed standards, and within stated limitations, and the power of investigation is no exception to the rule. It is established by the decisions of this court that the power of any governmental body to have access to books and documents, to investigate and require re-

ports, is limited to the purpose specified in the grant of power.*

Paragraph 2 (Section 8a) which grants the power to investigate the transactions of "affiliated interests" with public utilities does not state the purpose for which that power is to be used, and unless it be assumed that the State unconstitutionally delegated a broad power of investigation† without specifying its purpose or setting up any standards for, or limitations upon its use, we must look beyond Paragraph 2 for a statement of its purpose. That statement of purpose is made in the next succeeding paragraph. Paragraph 3 imposes upon the Commission the duty of passing upon, and approving or rejecting, all contracts between public utilities and "affiliated interests." The power to examine records and require reports is plainly in aid of the discharge of that duty.

The question of statutory interpretation involved in *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, is singularly analogous to that presented here. That case arose out of an investigation by the Interstate Commerce Commission which was pursued under the terms of Section 12 of the Interstate Commerce Act. Speaking through Mr. Justice Holmes, the court said:

> "The commission it will be seen is given power to require the testimony of witnesses 'for the purposes of this Act.' The argument for the commission is that the purposes of the act embrace all the duties that the act imposes and the powers that it gives the commission; that one of the purposes is that the commission shall keep itself informed as to the manner and method in which the business of the carriers is conducted, as required by § 12" (p. 419).
>
> * * * * *
>
> "the main purpose of the act was to regulate the in-

* *Federal Trade Commission* v. *American Tobacco Company*, 264 U. S. 298, 306; *International Text Book Company* v. *Pigg*, 217 U. S. 91, 112; *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, 419; *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, 445.

† See *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, *infra*.

terstate business of carriers, and the secondary purpose, that for which the commission was established, was to enforce the regulations enacted. These in our opinion are the purposes referred to; in other words the power to require testimony is limited, as it usually is in English-speaking countries at least, to the only cases where the sacrifice of privacy is necessary—those where the investigations concern a specific breach of the law.'' (pp. 419, 420.)

The purpose of and the limitations upon the power of investigation quoted in Section 12 was found, the Court held, in the immediately following paragraphs:

> ''The plain limit to the authority to institute an inquiry given by § 13, and the duty to make a report with findings of facts, etc., in the section next following, with hardly a word between, hang together, and show the purposes for which it was intended that witnesses should be summoned. They quite exclude the inference of broader power from the general words in § 12, as to inquiring into the management of the business of common carriers, subject to the provisions of the act, the commission keeping itself informed, etc.'' (p. 420.)

The power granted the Illinois Commerce Commission by paragraph 2 must be construed, we submit, not as unlimited by any legislative statement of its purpose, but strictly as a power granted in aid of the duty delegated to the Commission in the following paragraph of the same section.

The Provisions of Section 8a of the Illinois Public Utilities Act as Construed and Relied Upon by the Commission to Sustain Its Order, Are in Conflict With the Fourteenth Amendment to the Federal Constitution.

Section 8a of the Public Utilities Act permits the Commission to pursue alternative courses,—either to attempt to establish as a fact (2g, h) or simply to assume (2c, f) that the relationship between appellant and the Chicago District Company affected the policies and actions of the latter when the supply contract of July 25, 1931 was ex-

ecuted. In making the order challenged, the Commission chose the latter course, and proceeds on the theory that a ten per cent stock interest, or a director or elective officer in common, is the full equivalent of a finding of fact, after hearing and investigation (pursuant to 2g, h), that substantial influence is actually being exercised over the policies and actions of the local utility.

By its order here complained of the Illinois Commerce Commission seeks to make use of Section 8a of the Public Utilities Act to effect an extension of what, for convenience, we shall call the *one organization rule* announced by this Court in *Western Distributing Company* v. *Public Service Commission of Kansas.* 285 U. S. 119, 124, 126, and other recent decisions* without the essential factual basis from which the rule derives. In the Western Distributing Company case *all* of the stock of a local gas company and *all* of the stock of an interstate pipeline company, supplying gas to the local distributor, was owned by Cities Service Company. The court said, page 124:

> "Having in mind the affiliation of buyer and seller and the *unity of control* thus engendered, we think the position of the appellees is sound, and that the court below was right in holding that if appellant (*the local utility*) desired an increase of rates *it* was bound to offer satisfactory evidence with respect to all the costs which entered into the ascertainment of a reasonable rate. *Those in control of the situation have combined the interstate carriage of the commodity with its local distribution in what is in practical effect one organization. There is an absence of arm's length bargaining between the two corporate entities involved, and of all the elements which ordinarily go to fix market value.* The opportunity exists for one member of the combination to charge the other an unreasonable rate for the gas furnished and thus to make such unfair charge in part the basis of the retail rate. The state authority

* For other statements and applications of the rule see *Smith* v. *Illinois Bell Telephone Company*, 282 U. S. 133, 152; and *Columbus Gas & Fuel Company* v. *Public Utilities Commission of Ohio*, 292 U. S. 398, 414.

whose powers are invoked to fix a reasonable rate is certainly entitled to be informed whether advantage has been taken of the situation to put an unreasonable burden upon the distributing company, and the mere fact that the charge is made for an interstate service does not constrain the Commission to desist from all inquiry as to its fairness. Any other rule would make possible the gravest injustice, and would tie the hands of the state authority in such fashion that it could not effectively regulate the intrastate service which unquestionably lies within its jurisdiction." (Italics ours.)

And at page 126:

"The argument is made that the proofs demanded by the Commission will involve an extensive and unnecessary valuation of the pipeline company's property and an analysis of its business, and that this burden should not be thrown upon appellant. Whether this is so we need not now decide. It is enough to say that in view of the relations of the parties, and the power implicit therein arbitrarily to fix and maintain costs as respects the distributing company which do not represent the true value of the service rendered, *the state authority is entitled to a fair showing of the reasonableness of such costs, although this may involve a presentation of evidence which would not be required in the case of parties dealing at arm's length and in the general and open market, subject to the usual safeguards of bargaining and competition.*" (Italics ours.)

In every instance where this rule has been applied, as in the case just cited, there has been actual unity of control. The State cannot constitutionally create that factual basis by a legislative pronouncement which would make a 10 per cent common stock interest (under 2 c, f) the equivalent of a finding as a fact (under 2 g, h), after investigation and hearing, that substantial control is actually being exercised over the policies and actions of the local utility. On the theory that this legislative declaration is competent to establish a status which does not exist in fact, the Commission asserts that a determination of rates for the local utility, make it imperative that the Commission be advised

as to the earning experience of appellant under its contract with the Chicago District Company, and thus requires an investigation into the reasonableness of the payments received by appellant (R. 48, 51; this brief 64, 66). The power to require the showing demanded in the order is inseparably connected with the absence of arm's length bargaining, and that fact cannot be created by legislative declaration.

These provisions of the statute, construed and relied upon as authority for the order, are arbitrary and capricious in their selection of the persons or corporations to be regulated, are unreasonable and burdensome, are without real or substantial relationship to the object sought to be attained, and therefore deprive appellant of property without due process of law, and deny it the equal protection of the laws in contravention of the Fourteenth Amendment of the Constitution of the United States.*

A ten per cent common ownership of the stock of two corporations, or the existence of a common director or elective officer, may not be made arbitrarily to establish the absence of arm's length bargaining in business transactions between them, contrary to the fact. There might well be forty-nine per cent common stock ownership and yet the most rigid arm's length bargaining between the two corporate entities involved. The courts, and such administrative bodies as the Interstate Commerce Commission and the Federal Trade Commission have repeatedly held, as a fact, after investigation and hearing that 35%, 40% or 45% com-

* Recent decisions holding that due process requires (1) that the regulation shall not be arbitrary or capricious, either in its selection of the persons or corporations to be regulated or in the regulations imposed, and (2) that it be not unreasonably burdensome or without real or substantial relationship to the object sought to be attained, are: *Chicago Burlington & Quincy Railway* v. *Drainage Commissioners*, 200 U. S. 561, 593; *Railroad Retirement Board* v. *Alton*, 295 U. S. 330, 347-348, note 5; *Nebbia* v. *New York*, 291 U. S. 502, 525; *Norman* v. *Baltimore & Ohio R. R. Co.*, 294 U. S. 240, 311. The restraint imposed upon legislation by the due process clauses of the Fourteenth and Fifth Amendments is the same. *Heiner* v. *Donnan*, 285 U. S. 312; see *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1, 24, 25; *Barclay & Co.* v. *Edwards*, 267 U. S. 442, 450.

mon stock interest had not, in the particular instance under scrutiny, produced unity of control, or an absence of arm's length bargaining.* The question of fact which exists in every case may not be resolved by an arbitrary selection or classification of the persons to be subject to regulation.

Section 8a arbitrarily assumes that in cases of ten per cent common ownership, and in cases in which the two companies have one director in common, the parties are not dealing at arm's length and in the general and open market, subject to the usual safeguards of bargaining and competition. This assumption is unreasonable, arbitrary, *and, in the instant case, false.* Appellant alleges, and if given an opportunity will prove, that the contract of July 25, 1931 was executed only after the most rigid and prolonged bargaining at arm's length, in the general and open market, subject to the usual safeguards of bargaining and competition, and that the appellant all but abandoned its negotiations with the Chicago District Pipeline Company with a view to finding other markets for its gas before the parties at length came to an agreement. The statute and order here involved would preclude the appellant from making this showing and would require a presentation of evidence by appellant which this court recognized in the *Western Distributing Company Case* should not be required under the facts presented here.

This Court has held on many occasions that a statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it, violates the due process clause of the Fourteenth Amendment, and that legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty and property. In

* See, for example, *Re Purchase of Stock of C. & A. R. R. by Rock Island*, Finance Docket No. 2159, 72 Interstate Commerce Commission Reports, 273; *In re DeKalb-Ogle Telephone Company*, Docket No. 3312, before the Federal Communications Commission, decided September 9, 1936; and *In re Intra State Telephone Company*, Docket No. 3310, before Federal Communications Commission, decided August 13, 1936.

Western & Atlantic Railroad v. *Henderson,* 279 U. S. 639, 642, the Court said:

> "A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property."

In *Manley* v. *State of Georgia,* 279 U. S. 1, 6, it was held:

> "A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. *Bailey* v. *Alabama,* 219 U. S. 219, 233, *et seq.* Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property. '* * * it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.' *McFarland* v. *American Sugar Co.,* 241 U. S. 79, 86."

In *Bandini Co.* v. *Superior Court,* 284 U. S. 8, 18, the Court said:

> "The State, in the exercise of its general power to prescribe rules of evidence, may provide that proof of a particular fact, or of several facts taken collectively, shall be prima facie evidence of another fact when there is some rational connection between the fact proved and the ultimate fact presumed. The legislative presumption is invalid when it is entirely arbitrary, or creates an invidious discrimination, or operates to deprive a party of a reasonable opportunity to present the pertinent facts in his defense. *Mobile, J. & K. C. R. Y. Co.* v. *Turnipseed,* 219 U. S. 35, 43; *Bailey* v. *Alabama,* 219 U. S. 219, 238; *Lindsley* v. *Natural Carbonic Gas Co., supra,* at pp. 81, 82; *Manley* v. *Georgia,* 279 U. S. 1, 5, 6; *Western & Atlantic R. Co.* v. *Henderson,* 279 U. S. 639, 642."

In *Heiner* v. *Donnan,* 285 U. S. 312, 329, it was held:

> "This court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment. For example, *Bailey* v.

> *Alabama*, 219 U. S. 219, 238, *et seq.*, *Manley* v. *Georgia*, 279 U. S. 1, 5-6. 'It is apparent,' this court said in the Bailey case (p. 239) 'that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions'."

See also, to the same effect, *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 239; *Chicago, etc., Railway Co.* v. *Minnesota*, 134 U. S. 418, 458; and *Hoeper* v. *Tax Commission*, 284 U. S. 206, 215.

When the presumption is created arbitrarily without regard to the facts it is bad whether treated as a rule of evidence or of substantive law. The Court was clearly concerned with substantive law in the *Hoeper* v. *Tax Commission*, 284 U. S. 206. In *Heiner* v. *Donnan*, 285 U. S. 312, an Act of Congress created a conclusive presumption that gifts made within two years prior to the death of the donor were made in contemplation of death and the *res* subject to the graduated death transfer tax. It was contended that this was a rule of substantive law and, regarded as such, should be upheld. The Court held that the statute was unconstitutional whether it created a rule of evidence or a rule of substantive law, and that the statute would be no less objectionable even though it, in terms, imposed a transfer tax on all gifts made within two years of death. The Court said, page 329:

> "However, whether the latter presumption be treated as a rule of evidence or of substantive law, it constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not, and cannot be made to, exist in actuality, and the result is the same, unless we are ready to overrule the Schlesinger case, as we are not; for that case dealt with a conclusive presumption and the court held it invalid without regard to the question of its technical characterization.
> • • •

> "If a legislative body is without power to enact as a rule of evidence a statute denying a litigant the right to prove the facts of his case, certainly the power cannot be made to emerge by putting the enactment in the guise of a rule of substantive law."

Nor can the statute be justified on grounds of convenience. In *Schlesinger* v. *Wisconsin*, 270 U. S. 230, a statute which raised a presumption that all gifts made within six years of death were made in contemplation of death was defended on the ground that it was required by convenience, and necessary in order to prevent evasion of inheritance taxes. The Supreme Court said, page 240:

> "The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, 'A.' may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against 'B'. Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

Similar arguments were rejected in *Hoeper* v. *Tax Commission*, 284 U. S. 206, 215; and *Heiner* v. *Donna*, 285 U. S. 312, 328. In the last cited case this Court said:

> "This is very near to saying that the individual, innocent of evasion, may be stripped of his constitutional rights in order to further a more thorough enforcement of the tax against the guilty—a new and startling doctrine, condemned by its mere statement and distinctly repudiated by this court in the Schlesinger (p. 240) and Hoeper (p. 217) cases involving similar situations. Both emphatically declared that such rights were superior to this supposed necessity."

There is significance in the general similarity and one vital difference, between Section 8a of the Illinois Public Utility Act and certain provisions of the Federal Public

Utility Holding Company Act of 1935. In the Federal Act a "holding company" is defined to include: (1) any company which controls ten per centum or more of the stock of a public utility (Sec. 2 (7) A—15 U. S. C. A. 79b); (2) anyone which the Commission determines after notice and an opportunity for hearing is exercising a controlling influence over a public utility (Sec. 2 (7) B—15 U. S. C. A. 79b). In principle and in form, provision (A) thus conforms to 2 (c, f) of Section 8a, and provision (B) to Section 8a 2 (g, h). The vital difference between the two statutes which is of significance here is that unlike Section 8a (c, f), the arbitrary nature and effect of which is left wholly untempered, the corresponding provision of the Holding Company Act (Sec. 2 (7) A) is subject to the following:

> "The Commission, upon application, shall by order declare that a company is not a holding company under clause (A) if the Commission finds that the applicant (i) does not, either alone or pursuant to an arrangement or understanding with one or more other persons, directly or indirectly control a public-utility or holding company either through one or more intermediary persons or by any means or device whatsoever, (ii) etc." (Sec. 2 (7) B—15 U. S. C. A. 79b).

In so far as the appellant is deprived of its property without due process of law, while other persons, having in fact the same status escape the operation of the statute, the appellant is deprived of the equal protection of the laws. *Chicago, etc. Railway Co.* v. *Minnesota,* 134 U. S. 418, 458.

The order of the Commission rests upon a statute which is repugnant to the Fourteenth Amendment and should be enjoined.

The Order of the Illinois Commerce Commission, as Applied to This Appellant, Is In Contravention of the Commerce Clause of the Constitution of the United States.

Section 8a of the Illinois Public Utilities Act as construed by the appellees, and the order of the Commission here complained of, attempt to extend the common enterprise rule by placing the burden upon appellant, the interstate supply company not doing business in the state nor subject to the jurisdiction of the Commission, to establish the reasonableness of the contract rate at which it sells to the local utilities. In the *Western Distributing Company case** and the other cases in which the common enterprise rule has been given application by this court, it was the *local distributing company,* subject as such to the jurisdiction of the Commission, that was required to show the reasonableness of the earnings of the enterprise as a whole. The court said, in the *Western Distributing Co. case*:

> "Having in mind the affiliation of buyer and seller and the *unity of control* thus engendered, we think the position of the appellees is sound, and that the court below was right in holding that if appellant (*the local utility*) desired an increase of rates *it* was bound to offer satisfactory evidence with respect to all the costs which entered into the ascertainment of a reasonable rate." (p. 134)

But in this case the Illinois Commission would require the nonregulated interstate company to establish the reasonableness of the earnings accruing to it from sales, in interstate commerce, to the local utilities. By this order the Commission exceeded its powers and imposed an illegal burden upon interstate commerce.

That the sale, transportation and delivery of natural

* Western Distributing Company v. Public Service Commission of Kansas, 285 U. S. 119. Smith v. Illinois Bell Telephone Co. 282 U. S. 133, 152; and Columbus Gas & Fuel Co. v. Public Utilities Comm'n. of Ohio, 292 U. S. 398, 414.

gas in interstate commerce is not subject to state regulation or interference is established by a long line of decisions of this Court. In *Public Utilities Commission* v. *Landon*, 249 U. S. 236, 245, the Court said:

> "That the transportation of gas through pipe lines from one state to another is interstate commerce may not be doubted. Also, it is clear that as part of such commerce the receivers might sell and deliver gas so transported to local distributing companies free from unreasonable interference by the state."

In *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, 307, 308, this Court said:

> "Transportation of gas from one state to another is interstate commerce; and the sale and delivery of it to the local distributing companies is a part of such commerce. * * * The commerce clause of the Constitution, of its own force, restrains the states from imposing direct burdens upon interstate commerce * * * and enforcement of a selling price in such a transaction places a direct burden upon such commerce inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve."

In *State Commission* v. *Wichita Gas Co.*, 290 U. S. 561, 563, the Court said:

> "But the sale, transportation and delivery of natural gas by the pipe line company to the distributing companies constitutes interstate commerce and therefore the state is without power to prescribe rates or prices to be charged therefor."

See also *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U. S. 229; *Haskell* v. *Natural Gas Co.*, 224 U. S. 217; *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465.

Nor does the fact that Congress has not seen fit to regulate the interstate transportation of gas warrant the State of Illinois in exercising jurisdiction over appellant. This line of reasoning was rejected by this Court in the case of

Missouri v. *Kansas Gas Company*, 265 U. S. 298, 308, where the Court said:

> "The contention that, in the public interest, the business is one requiring regulation, need not be challenged. But Congress thus far has not seen fit to regulate it, and its silence where it has the sole power to speak, is equivalent to a declaration that that particular commerce shall be free from regulation. See *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 493."

Where a company is engaged in both inter and intrastate commerce, and its intrastate commerce is subject to state regulation, any indirect burden upon its interstate commerce which results from, or is incidental to, the lawful regulation of its intrastate business, is not prohibited by the Constitution. We are not concerned with that situation in the instant case. Appellant is not engaged in intrastate commerce; no part of its business is subject to state regulation; its commerce is wholly interstate and national in character. Any interference with its business, any burden upon its commerce, is a direct and illegal burden upon interstate commerce, regardless of the degree of that interference or the extent of the burden. As was said in *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 249, 259.

> "The action of the state as a regulation of interstate commerce does not depend upon the degree of interference; it is illegal in any degree."*

The rule controlling in this case is that announced by this Court in *International Text Book Co.* v. *Pigg*, 217 U. S. 91, 112. In that case the Court held that a statute requiring a foreign corporation to file certain schedules with the Secretary of State as a condition precedent to the right to do business in the state is unconstitutional. The informa-

* Compliance with the Commission's order will result in great damage and harm to appellant and to its interstate business. The nature and extent of the appellant's damage which would result from compliance with the order of the Illinois Commerce Commission is discussed on pages 12 to 15 of this brief.

tion required by the statute involved in that case was not confidential as is the information demanded by the Illinois Commerce Commission, nor would the filing of such schedules ordinarily result in anything like the damage to the foreign corporation in question as enforcement of the order of the Illinois Commerce Commission will cause appellant in the present case. Yet, this Court said:

> "It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business. But *such a burden is imposed when the corporation of another state, lawfully engaged in interstate commerce, is required, as a condition of its right to prosecute its business in Kansas, to make and file a statement setting forth certain facts which the state, confessedly, could not control by legislation.*"

This language has been quoted with approval by this Court in many subsequent cases.* Its application to the instant case is unmistakable. The State of Illinois confessedly may not control by legislation the rates or profits of Natural Gas Pipeline Company of America.† To require the appellant to make and file schedules and statements setting forth facts which are not within the jurisdiction of the Illinois Commerce Commission is an illegal burden and interference with interstate commerce. Here, as in the cases cited, unless relief is granted, the appellant's only alternatives to a withdrawal from the pursuit of its interstate business in Illinois, is to suffer the threatened penalties, or to sustain the irreparable injury which flows from compliance with the order.

The precise situation with which we are involved was before the Supreme Court of Missouri in the case of *State* v. *Public Service Commission*, 337 Mo. 809; 85 S. W. (2) 890.‡

---

* To the same effect are *Buck Stove Company* v. *Vickers*, 226 U. S. 205, and *International Text Book Company* v. *Lynch*, 218 U. S. 664.

† See cases cited on pages 38 and 39 of this brief.

‡ Petition for writ of certiorari denied, *Public Service Commission, et al.* v. *Missouri ex rel. Cities Service Gas Co.*, 296 U. S. 657.

The Missouri Public Service Commission had directed the Cities Service Gas Company, an interstate pipeline company, to file schedules of rates. The appellant company was engaged in the sale and transportation of natural gas from a point outside the State of Missouri to industrial plants and local distributing companies within the State of Missouri. The order of the Missouri Commission did not purport to regulate the rates charged by the interstate company, nor to require a valuation of its properties, but merely directed the appellant company to file schedules of the rates it charged to distributing companies and industrial concerns. The Circuit Court had sustained the order of the Commission. The Supreme Court of Missouri held the order void as an illegal interference with interstate commerce. The Court said, page 898:

> "We think that the Pipeline was engaged in interstate commerce and that it was not subject to the jurisdiction of the Commission. From what we have said, it follows that the judgment of the Circuit Court should be reversed. It is so ordered."

The Court Below Erred if It Sustained the Order on the Ground That It Was a Process in the Nature of a Subpoena.

The theory on which the court below denied appellant's application for an interlocutory injunction is not altogether clear. In its memorandum opinion the Court declared that the order of the Commission "is not dependent upon the validity of the Illinois statute *which seems to be particularly relied upon by counsel, or the Illinois Commerce Commission*" (R. 89), but added in the same opinion that:

> "It is true that a procedure by way of a subpoena duces tecum would be the more usual method, but there is no essential difference between the command of a subpoena duces tecum and the order of the Commission which is sought to be restrained. If the plaintiff

> preferred to produce its records only in response to a subpoena it might have pointed out this supposed defect of procedure to the Commission."

Recognizing that infirmities were encountered in the treatment of the order as a subpoena, the Court concluded:

> "If the order is somewhat broader than may be necessary, this, likewise, could have been pointed out to the Commission by way of motion."

After this memorandum had been mailed to counsel, the attorneys for the Illinois Commerce Commission prepared and submitted to the court, Findings of Fact and Conclusions of Law which were thereafter signed by the court, and in which the court found that the order of the Illinois Commerce Commission was authorized by Section 8a of the Public Utilities Act (R. 97).

The appellees have at no time taken the position that the order was issued as a subpoena under the provisions of the Act authorizing the issuance of the subpoenas, but on the contrary, have at all times insisted (R. 60), and the order itself shows (R. 50, this brief, 64, 66) that it is made in the exercise *of jurisdiction* which Section 8a of the Public Utilities Act purports to grant to the Commission in specific terms.

The Commission is given undoubted authority by the Public Utilities Act to subpoena evidence which is relevant and material to any proceeding pending before it over which it has jurisdiction,* but the order of the Illinois Commerce Commission complained of here is not a subpoena; it is an attempt to exercise jurisdiction over appellant. The Commission is not demanding the production of any document or paper now in the possession of the appellant, but is requiring appellant to keep its books and records constantly open and accessible to the Commission and its

* Sections 64 and 66 of the Illinois Public Utilities Act, which provide for the issuance of subpoenas and for the production of documentary evidence are set out in full in Appendix B, pages 70 to 73.

agents, and to prepare schedules and reports of property values, costs, operating expenses, profits and other data as a basis for an exercise of judgment by the Commission as to the reasonableness of the appellant's earnings. In directing appellant to make available its books for examination at any time by its officers and agents the Commission is asserting the same jurisdiction over the books and records of the appellant that Section 63 of the Illinois Public Utilities Act* gives the Commission over the books, accounts and records of public utilities engaged in intrastate commerce and subject to the jurisdiction of the Commission. There is no subpoena known to the law which is designed or competent to perform such a function.

Moreover, the business of the Chicago District Company and of appellant do not constitute a common enterprise, so that the data and information required to be produced by the order cover matters which are not of lawful concern to the Commission and into which it may not inquire. Under these circumstances, the order is equally bad whether it be regarded as a process in the nature of a subpoena or as an exercise of jurisdiction, as it in fact is, under Section 8a of the Illinois Public Utility Act. In other words, the court was in error in its belief that the fundamental weakness of the Commission's order when viewed as an exercise of jurisdiction conferred by Section 8a could be avoided merely by regarding it as a process in the nature of a subpoena.

---

* See Appendix B, page 73.

PART II.

THE PROCEDURAL LAW.

The Denial of Appellant's Application for an Interlocutory Injunction Was an Improvident Exercise of Judicial Discretion.

The Court below erred in holding that the order of the Commission was authorized by Section 8a and that the provisions of Section 8a, relied upon by the appellees to sustain the order are constitutional, without permitting appellant to introduce evidence demonstrating that Section 8a as applied to appellant in the Commission's order deprives appellant of property without due process of law and denies it the equal protection of the laws. The Court erred in holding that the order of the Commission does not contravene the commerce clause without giving appellant an opportunity to prove that the enforcement of the order will directly burden and obstruct appellant's interstate commerce. The Court erred in holding that the order could be sustained apart from Section 8a of the Illinois Public Utilities Act without allowing appellant to prove that under the decisions of this Court there is no basis in fact for the order. The right of the Commission to investigate the reasonableness of appellant's profits in proper proceedings and in a lawful manner can only be determined by a trial on the merits. This Court held in the *Western Distributing Company case,* 285 U. S. 119 that a presentation of evidence such as is demanded by the order of the Illinois Commerce Commission,

> "*would not be required in the case of parties dealing at arm's length* and in the general and open market subject to the usual safeguards of bargaining and competition."

Appellant stands ready and willing to prove that the contract between the appellant and the Chicago District Pipeline Company was executed by parties dealing at arm's length and in the general and open market subject to the usual safeguards of bargaining and competition. Instead of summarily foreclosing appellant on these important issues, the Court below should have granted appellant an interlocutory injunction and set the case for hearing on the merits.

An interlocutory injunction will be granted when the questions presented are grave and the injury to the moving party will be certain and irreparable if the application be denied, and final decree be in its favor, while if the injunction be granted the injury to the opposing party, even if final decree be in its favor, will be inconsiderable.

An application for an interlocutory injunction is addressed to the sound discretion of the trial court; however, this Court has established a definite rule to be applied in the exercise of that discretion, and if such discretion is improvidently exercised or abused the decision of the lower court will be reversed.

The rule to be applied in the determination of an application for an interlocutory injunction is stated in *Ohio Oil Company* v. *Conway*, 279 U. S. 813, 815, where this Court said:

> "Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable if the application be denied, and the final decree be in his favor, while if the injunction be granted the injury to opposing party, even if the final decree be in his favor, will be inconsiderable or may be adequately indemnified by a bond, the injunction usually will be granted."

This rule was further amplified and confirmed in *Alabama* v. *United States*, 279 U. S. 229, 230, where it is said:

> "It is well established doctrine that an application for an interlocutory injunction is addressed to the sound discretion of the trial court; and that an order either granting or denying such an injunction will not be disturbed by an appellate court unless the discretion was improvidently exercised. *Meccano, Ltd.* v. *John Wanamaker*, 253 U. S. 136, 141; 2 High on Injunctions (4th Ed.) Sec. 1696. And see *Rice & Adams Corporation* v. *Lathrop*, 278 U. S. 509. The rule generally to be applied in the exercise of that discretion, is stated in our recent decision in *Ohio Oil Co.* v. *Conway*, post, p. 813.
>
> "That the doctrine to be allowed in reviewing such an order applies in the case of an order of a court of three judges denying an interlocutory injunction does not admit of doubt. *United Fuel Gas Co.* v. *Public Service Commission of West Virginia*, 278 U. S. 322, 326; *Chicago, G. W. Ry.* v. *Kendall*, 266 U. S. 94, 100. The duty of this Court, therefore, upon an appeal from such an order, at least generally, is not to decide the merits but simply to determine whether the discretion of the court below has been abused."

An application of the rule stated in these decisions to a case very similar to the one with which we are involved will be found in *Foster Packing Co.* v. *Haydel*, 278 U. S. 1 in which this Court reversed an order of the District Court of three judges which had refused a temporary injunction in a suit to restrain the enforcement of the Louisiana "Shrimp Act." The Court said, page 13:

> "If the facts are substantially as claimed by plaintiffs, the practical operation and effect of the provisions complained of will be directly to obstruct and burden interstate commerce. *Penna* v. *West Virginia, supra. Oklahoma* v. *Kansas Nat. Gas Co., supra.* The affidavits give substantial and persuasive support to the facts alleged. And as, pending the trial and determination of the case, plaintiffs will suffer great and irremediable loss if the challenged provisions shall be enforced, their right to have a temporary injunction

is plain. From the record it quite clearly appears that the lower court's refusal was an improvident exercise of judicial discretion."

It appears by these decisions that an interlocutory injunction will be granted,

(a) If the questions presented are of grave consequence to the applicant and of great public importance;

(b) If injury to the moving party will be certain and irreparable if the application for interlocutory injunction is denied and final decree be in its favor; and

(c) If the injury to the defendant will be inconsiderable if the application for interlocutory injunction is granted and final decree be in its favor.

It is respectfully submitted that each of these conditions is satisfied by the facts in the instant case, that the order of the lower court refusing appellant's application for an interlocutory injunction was an improvident exercise of judicial discretion and that the decision of that court should be reversed.

(a) The questions presented in this case are of grave consequence to the appellant and of great public importance.

The importance of the case to appellant has already been stated.* Unless the decision of the court below denying appellant's application for an interlocutory injunction is reversed, appellant will be compelled to comply with the order of the Illinois Commerce Commission without a trial on the merits. The damage which will result to appellant from compliance with the order would be great and irreparable. The nature and extent of appellant's damage has been stated elsewhere herein (pages 12 to 15).

The public importance of the questions involved in this cause is not easily overstated. The so-called one organization rule as laid down by this Court was universally thought to be an important and far reaching development of

* See pages 12 to 15, *supra*.

public utility and rate-making law, but the expansion of that doctrine by legislative enactment in the manner attempted in the instant case would revolutionize all established concepts of the limits on the power of the states in this field of the law.

By the challenged order, appellant is directed to make its records available to the Commission and to prepare and submit such reports and data as are deemed essential by the Commission to enable it to exercise a judgment as to the reasonableness of the earnings which appellant derives from its interstate sales to the local utility. It is asserted that the statute authorizes such an order against any corporation related to a local utility by ten per cent common stock interest, or by one common director. It may be fairly and safely assumed that local utilities operating everywhere within the respective states are, like the Chicago District Company, constantly purchasing supplies from companies which operate solely in interstate commerce and are thus, by all previously accepted standards, free from interference or regulation by the states. If the State of Illinois may assume jurisdiction over appellant because of a ten per cent common stock interest which can be shown to have had no effect upon the relations between it and the local utility, it may do so on the basis of a two per cent interest, or indeed, without resort to any such artificial and arbitrary classification, with the result that every company doing business solely in interstate commerce may be required by the state to establish the reasonableness of the earnings which it receives from transactions with local utilities. The far reaching question whether any such power exists in the state is obviously one of great public importance.

(b) Injury to the appellant will be certain and irreparable if the application for interlocutory injunction is denied and final decree be in its favor.

The nature and extent of the damage to appellant which would result from the enforcement of the order of the Commission is discussed on pages 12 to 15 of this brief.

Compliance with the Commission's order must of necessity immediately follow the denial of appellant's application for an interlocutory injunction. Sections 76 and 77 of the Illinois Public Utilities Act* provide a maximum penalty for violation of the orders of the Illinois Commerce Commission of $2,000 per day for each day of continuing disobedience, and a fine of $1,000 and one year's imprisonment for each officer, agent, attorney or other person who procures, aids or abets such disobedience. These penalties are so drastic and severe that if an interlocutory injunction is denied appellant must yield to an order of uncertain legality, rather than to suffer their infliction. The enforcement of the order has been restrained by order of this court, but compliance with the Commission's order must of necessity immediately follow an affirmance of the order of the three judge court denying appellant's application for an interlocutory injunction. Unless the enforcement of the order of the Illinois Commerce Commission is restrained pending the trial on the merits, appellant will be compelled to comply with the Commission's order without an opportunity first to test its constitutionality.

Due process of law requires that appellant be permitted to resort to a court of equity fully to test the lawfulness of the order involved in this case without the risk of incurring the penalties provided by the Illinois Public Utilities Act,† but appellant is deprived of this remedy without the protection of an interlocutory injunction.

---

* These sections are set out in full in Appendix B, this brief, pages 74 and 75.

† *Ex Parte Young*, 209 U. S. 123, 165; *Wadley & Southern Ry. Co. v. Georgia*, 235 U. S. 651, 662, 666. See this brief, pages 52 and 53.

(c) Even if appellees be found entitled to a final decree in their favor upon the trial of the case upon its merits they will not suffer injury in any degree from the granting of the interlocutory injunction here sought.

The granting of an interlocutory injunction will not adversely affect the public interest. The citation directed to the Chicago District Pipeline Company* is to show cause why its rates should not be reduced. That proceeding, in which the order complained of was entered, is shown to be collateral to a rate case, involving The Peoples Gas Light and Coke Company (R. 45; this brief 60) and was instituted in support of a denial of a rate increase proposed by the Peoples Gas Light and Coke Company. That proceeding before the Commission has been finally determined. The Commission has entered a final order denying the petition of The Peoples Gas Light and Coke Company for an advance in rates for gas service in Chicago.† A collateral proceeding filed in the Circuit Court of Cook County to restrain the Commission from suspending the proposed rate increase of The Peoples Gas Light and Coke Company‡ has been tried before a Master in Chancery. The Master has made his report to the Circuit Judge, who holds the matter under advisement pending final judgment.

There is no pending proceeding involving rates of distributors to the consuming public of the State of Illinois in which the information demanded by the Illinois Commerce Commission of this appellant could now be used. An inter-

---

* See Appendix A, this brief, page 59.

† The Peoples Gas Light and Coke Company in the matter of its petition for a proposed advance in rates, Illinois Commerce Commission Docket 24792; final order entered denying the petition on May 21, 1937.

‡ *Peoples Gas Light and Coke Company* v. *Slattery, et al.*, in the Circuit Court of Cook County, No. 36C 9986. The order of the Circuit Court granting the distributor an interlocutory injunction pending a trial on the merits was reversed by the Appellate Court of Illinois in the case of *Peoples Gas Light and Coke Company* v. *Slattery*, 287 Ill. App. 379, 5 N. E. (2) 285; appeal to the Supreme Court of Illinois dismissed October 5, 1937.

locutory order enjoining the enforcement of the order of the Illinois Commerce Commission until the court can inquire into the constitutionality of that order, on the basis of a full presentation of the facts, can result in no damage to consumers of gas in the State of Illinois, nor to the Illinois Commerce Commission. On the other hand, as pointed out above, the denial of such application would cause the appellant irreparable harm and injury.

Appellant Is Entitled to Resort to the Federal Equity Courts for Relief from the Unconstitutional Order of the Illinois Commerce Commission.

The Federal Courts sitting in equity will enjoin threatened invasion of rights secured by the Federal Constitution.

In *Sterling* v. *Constantine,* 287 U. S. 378, 393, the Court said:

> "The applicable principle is that where State officials, purporting to act under State authority, invade rights secured by the Federal Constitution, they are subject to the process of the Federal Courts in order that the persons injured may have appropriate relief."

In *Terrace* v. *Thompson,* 263 U. S. 197, 214, the Court said:

> "Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person, who as an officer of the State is clothed with the duty of enforcing its laws and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a federal court of equity."

In *Cavanaugh* v. *Looney,* 248 U. S. 453, 456, the Court said:

> "It is now settled doctrine 'that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and

> who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action' ".

Section 266 of the Judicial Code* also, by implication, authorizes suits of this kind.

Because of penalties provided for disobedience of the orders of the Illinois Commerce Commission, it would be a violation of due process of law to deny the appellant the right to maintain this suit in equity.

Sections 76 and 77 of the Illinois Public Utilities Act† provide a maximum penalty for violation of the orders of the Illinois Commerce Commission of $2,000 per day for each day of continued disobedience, and a fine of $1,000 and one year's imprisonment for each officer, agent, attorney or other person who procures, aids or abets such disobedience. These penalties are so drastic and severe that it is better for appellant to yield to an order of uncertain legality than to ask the protection of the law at the risk of their infliction.

Due process of law requires that appellant be permitted to resort to a court of equity to test the constitutionality of the statute and the order involved in this case without the risk of incurring these onerous penalties. In *Ex Parte Young,* 209 U. S. 123, 165, this Court said:

> "To await proceedings against the company in a state court grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court, would place the company in peril of large loss and its agents in great risks of fines and imprisonment if it should be finally determined that the act was valid. This risk the company ought not to be required to take."

---

* 28 U. S. C. A. 380.

† See Appendix B, this brief, pages 74 and 75, where these sections are set out in full.

And in *Wadley Southern Railway Co.* v. *Georgia,* 235 U. S. 651, the Court said, page 662:

> "A statute therefore which imposes heavy penalties for violation of commands of an unascertained quality, is in its nature, somewhat akin to an *ex post facto* law since it punishes for an act done when the legality of the command has not been authoritatively determined. Liability to a penalty for violation of such orders, before their validity has been determined, would put the party affected in a position where he himself must at his own risk pass upon the question. He must either obey what may finally be held to be a void order, or disobey what may ultimately be held to be a lawful order. If a statute could constitutionally impose heavy penalties for violation of commands of such disputable and uncertain legality the result inevitably would be that the carrier would yield to void orders, rather than risk the enormous cumulative or confiscatory punishment that might be imposed if they should thereafter be declared to be valid."

After discussing the more important decisions on this subject, the Court said, page 666:

> "In the light of this unbroken line of authorities, therefore, a statute like the one here involved (under which penalties of $5,000 a day could be imposed for violating orders of the Commission) *would be void if access to the courts to test the constitutional validity of the requirement was denied; or, if the right of review actually given was one of which the carrier could not safely avail itself."*

Appellant is not required to apply to the Illinois Commerce Commission for a modification of the Commission's order before seeking relief in the Federal Courts.

In *Prendergast* v. *New York Telephone Co.,* 262 U. S. 43, 48, the Court said:

> "It was not necessary that the Company should apply to the Commission for a rehearing before resorting to the court. While under the Public Service Commission law, any person interested in an order of the Commission has the right to apply for a rehearing,

the Commission is not required to grant such rehearing, unless, in its judgment, sufficient reason therefor appear; the application for the rehearing does not excuse compliance with the order or its enforcement, except as the Commission may direct; and any change made in the original order upon the rehearing does not affect the enforcement of any right arising from the original order. As the law does not require an application for a rehearing to be made, and its granting is entirely within the discretion of the Commission, we see no reason for requiring it to be made as a condition precedent to the bringing of a suit to enjoin the enforcement of the order. (Citing Cases.) In *Palermo Land & Water Company* v. *Railroad Commission*, 227 Fed. 708, the statute specifically provided that no cause of action should accrue in any court out of any order of the Commission unless an application for a rehearing had been made. Here the Commission did not suggest in its answer that it perceived any ground upon which it would have granted a rehearing if an application had been made; but, on the contrary, maintained the correctness of its orders in all respects. Manifestly, under such circumstances, the injunction should not have been denied merely because application had not been made to the Commission for a rehearing.

"And for like reasons it was not necessary that the Company should have exercised the privilege granted by one of the orders of applying to the Commission for modification of the classification."

The Illinois statute is precisely the same in all material respects as the one under consideration in the *Prendergast* case; and the Illinois Commission has, in its answer, maintained the correctness of its order in all respects. Our case is on all fours with the *Prendergast* case.

See also *Banton* v. *Belt Line Railway*, 268 U. S. 413, 416, where the Court said:

"No application to the commission for relief was required by the state law. None was necessary as a condition precedent to the suit. See *Prendergast* v. *N. Y. Tel. Co.*, 262 U. S. 43, 48; *United States* v. *Abilene & So. Ry. Co.*, 265 U. S. 274, 282."

CONCLUSION.

I.

1. The order complained of rests upon a misconstruction of the statute. An investigation is not an end in itself; to be valid it must be a means to a lawful end. The grant of the power must be accompanied by a statement of its purpose. The power to require the submission of records and reports granted by paragraph 2 (Section 8a) which contains no statement of its purpose must be interpreted as being granted solely to enable the Commission intelligently to discharge the duty imposed by the next succeeding paragraph of the Act.

It is shown by the order itself, by the citation initiating the case in which the order was issued, and by the answer, that the Commission seeks to use the required information for a very different purpose, namely, to give the statute the same practical effect with respect to contracts made prior to its enactment as paragraph 3 declares it shall have with respect to contracts made after its enactment. This is in conflict with the clear intent of the statute and the order should be enjoined on the ground that it exceeds the statutory power of the Commission.

2. By the order complained of the Commission is preparing to pass judgment on the earnings of appellant on the theory that it and the Chicago District Company have the status of a common enterprise. The order rests upon a statute which purports to create a factual basis for that action which in truth does not exist. By legislative declaration a ten per cent common stock interest is sought to be made the full equivalent of "a finding, as a fact, after investigation and hearing that substantial influence is actually being exercised over the policies and actions" of the local utility. Here there has been no investigation, no hear-

ing, no finding of fact. The presumption created is false, but the statute gives appellant no opportunity to rebut it. So construed and applied the state is arbitrary and capricious, takes appellant's property without due process of law, and denies it the equal protection of the laws.

3. The statute as construed and applied by the order of the Commission, would require one engaged solely in interstate commerce to present evidence necessary to enable the State to pass judgment on its earnings and profits, and imposes a direct burden upon interstate commerce.

The issue is one of far-reaching public importance. The State is asserting a purpose to pass judgment upon the reasonableness of profits accruing to appellant from sales in interstate commerce to a local utility. It predicates the right to do so on a presumption as to the relationship between the parties which is false in fact. If the State may do this, it may do it without resorting to the fiction created here. The question, therefore, is whether a State shall have the power to pass judgment upon the reasonableness of the profits of all who make sales in interstate commerce to a local utility, and to require the interstate company to prepare and submit the evidence necessary to the exercise of that judgment.

Compliance with the order would inflict immediate, great, and irreparable injury upon the appellant, and we respectfully submit that it should be enjoined.

II.

The court below, without hearing any evidence, has held the order of the Illinois Commerce Commission here complained of to be a valid order within the jurisdiction of the Commission. Without a trial on the merits the court has held the order to be authorized by Section 8a of the Public Utilities Act and has sustained the constitutionality of that Act as applied to appellant. Appellant is prepared to prove that there is and was no common control of ap-

pellant and the Chicago District Pipeline Company, that the supply contract of July 25, 1931 between the appellant and Chicago District Pipeline Company was executed after arm's length bargaining in the open market, subject to the usual safeguards of bargaining and competition, and that the statute as interpreted by the Commission and as applied to the appellant in the Commission's order, is unreasonable, arbitrary and void, and imposes a direct and illegal burden upon interstate commerce. The court in effect decided this case on the merits without hearing any of the evidence.

The court further erred in denying plaintiff's application for interlocutory injunction pending a trial on the merits. This Court has held that an interlocutory injunction will be granted where the questions presented are grave, and the injury to the moving party will be certain and irreparable if the application be denied, and final decree be in its favor, while if the injunction be granted the injury to the opposing party, even if final decree be in its favor, will be inconsiderable. Each of these conditions is satisfied by the facts in the instant case.

Respectfully submitted,

WILLIAM P. SIDLEY,
J. J. HEDRICK,
DONALD F. MCPHERSON,
DOUGLAS F. SMITH,
HOWARD NEITZERT,
Counsel for the Appellant, Natural Gas Pipeline Company of America.

SIDLEY, MCPHERSON, AUSTIN AND BURGESS,
Attorneys for Appellant.

APPENDIX A.

The Citation and Order of the Illinois Commerce Commission Involved in This Case.

(See Record pages 44 to 51.)

STATE OF ILLINOIS,

ILLINOIS COMMERCE COMMISSION.

Illinois Commerce Commission, On its own motion *vs.* Chicago District Pipe Line Company. Citation to show cause why there should not be a reduction in rates charged for natural gas to distributing companies in the State of Illinois.	25218.

CITATION.

WHEREAS, it is the duty of this Commission, as a regulatory body, to institute investigations of the utilities under its jurisdiction from time to time to determine whether the rates charged are just and reasonable; and

WHEREAS, the Chicago District Pipe Line Company supplies natural gas to Peoples Gas Light and Coke Company, Western United Gas and Electric Company, and Public Service Company of Northern Illinois at rates filed with

this Commission pursuant to an order which specifically provided "that the consent herein should be granted with the express reservation and upon the condition that nothing herein contained shall in any manner affect the Commission's power at any time hereafter, by appropriate proceedings, to inquire into and determine the reasonableness of the cost of gas to the Chicago District Pipe Line Company;" and

WHEREAS, there is now pending before this Commission Case No. 24792, being The Peoples Gas Light and Coke Company in the matter of proposed advances in rates for gas service in Chicago, stated in Rate Schedule Ill. C. C. No. 19 rendered by said company; and

WHEREAS, one of the largest items of operating expense of said People Gas Light and Coke Company is the cost of natural gas purchased by it from Chicago District Pipe Line Company being in excess of $10,000,000 per year; and

WHEREAS, Chicago District Pipe Line Company, Western United Gas and Electric Company, Public Service Company of Northern Illinois and Peoples Gas Light and Coke Company are all affiliates of Natural Gas Pipe Line Company of America which sells gas to Chicago District Pipe Line Company which it, in turn, resells to Western United Gas and Electric Company, Public Service Company of Northern Illinois and Peoples Gas Light and Coke Company; and

WHEREAS, a preliminary investigation of the records available to the Commission discloses that the charge for gas purchased by said Chicago District Pipe Line Company from Natural Gas Pipe Line Company of America is excessive and unreasonable; and

WHEREAS, the cost of gas sold to Chicago District Pipe Line Company by Natural Gas Pipe Line Company of

America is the largest item of operating expense of said Chicago District Pipe Line Company; and

WHEREAS, the determination of the true operating income of Peoples Gas Light and Coke Company depends in part upon the reasonableness of the charges to it for gas sold to it by Chicago District Pipe Line Company; and

WHEREAS, in the opinion of the Commission, the matters above recited constitute good cause why the rates of Chicago District Pipe Line Company should now be investigated and that company should be required to demonstrate that its present rates are not excessive and should not be reduced;

NOW, THEREFORE, BE IT RESOLVED:

That the Chicago District Pipe Line Company should be required to show cause if any there be why its rates charged for gas sold to operating companies should not be reduced.

IT IS THEREFORE ORDERED that the Chicago District Pipe Line Company be and it is hereby cited to appear before the Commission at its offices in the City of Chicago, Illinois, Room 2600, I North La Salle Street, on the 15th day of December, 1936, at the hour of 10:00 A. M. Central standard time, to show cause if any there be why there should not be a reduction in rates charged by it for gas sold to operating companies in the State of Illinois. By order of the Commission at Springfield, Illinois, this 17th day of November, A. D. 1936.

WILLIAM W. HART,
Secretary.

(SEAL)

STATE OF ILLINOIS,

ILLINOIS COMMERCE COMMISSION.

Illinois Commerce Commission, On its own motion *vs.* Chicago District Pipe Line Company. Citation to show cause why there should not be a reduction in rates charged for natural gas to distributing companies in the State of Illinois.	25218.

INTERLOCUTORY ORDER.

By the Commission:

This proceeding was begun by a citation issued by this Commission against the Chicago District Pipeline Company on November 17, 1936, ordering said company to appear and show cause, if any there might be, why there should not be a reduction in rates for gas sold at wholesale by said company to The Peoples Gas Light and Coke Company, Public Service Company of Northern Illinois and Western United Gas and Electric Company.

Hearing in this matter was set for December 15, 1936 and was continued on that date to December 18, 1936. No testimony was heard on that date and the case was again continued to January 13, 1937. On the last mentioned date the company presented two witnesses, Mr. William G. Rudd, Vice-president of the company, and Mr. Frank L. Griffith, Vice-president and Comptroller of the company.

The case was then continued to January 20, 1937, on which date Mr. Frank L. Griffith testified further when the company closed its direct case. Since that time several hearings have been held at which counsel for the Commission has carried on cross examination of company witnesses.

It appears from the testimony in the record that Chicago District Pipeline Company is an Illinois corporation operating as a public utility engaged in the business of supplying gas at wholesale to three operating utility companies who are engaged in the business of supplying gas to consumers in the Chicago area.

The Chicago District Pipeline Company produces no gas but purchases and sells only natural gas which it receives from Natural Gas Pipeline Company of America, taking delivery thereof at the terminus of a 24-inch pipe line from Texas to Joliet, Illinois.

The Natural Gas Pipe Line Company of America is an interstate pipe line operator, which transports natural gas from the fields located in the Panhandle district in Texas through its pipe line to a point located southwest of Joliet in Illinois, where it is delivered to Chicago District Pipeline Company.

The price which Chicago District Pipeline Company pays to said Natural Gas Pipe Line Company of America for this gas is determined by a contract between said Chicago District Pipeline Company and Natural Gas Pipe Line Company of America, which has been introduced in evidence in this case as Company Exhibit 2. It further appears from the record in this case in Company Exhibit 9 that the operating expenses of Chicago District Pipeline Company for 1936 were $12,818,713.89, of which amount the sum of $12,362,288.15 was paid to Natural Gas Pipe Line Company of America for gas purchased from said company under the terms of the contract referred to above.

In cases Nos. 21261, 21262, 21263, 22386, 22387, and 22388, consolidated, testimony on behalf of the respondent here was introduced as to estimated profits of Natural Gas Pipe Line Company of America from said business, and as to the actual profits earned by said company to February, 1932. On the basis of the evidence in those cases the Commission allowed Chicago District Pipeline Company to file the schedule of rates (Company Exhibit 8), which is the subject of investigation here. After three full years of operation under the present arrangement it is now imperative that the Commission be advised as to the experience of these companies with respect to the transactions between them.

It appears from the record that the stock of Natural Gas Pipe Line Company of America is owned and held by six corporations in varying percentages, with Natural Gas Investment Company owning 26.6 per cent of that stock. It further appears that 79.54 per cent of the stock of Natural Gas Investment Company is owned by The Peoples Gas Subsidiary Company, a wholly owned subsidiary of The Peoples Gas Light and Coke Company. The stock of Chicago District Pipeline Company, respondent here, is entirely owned by Natural Gas Investment Company.

It further appears from the record that George F. Mitchell, President of Chicago District Pipeline Company, is President and Director of Natural Gas Investment Company and a Director of Natural Gas Pipe Line Company, and also that H. P. Sedwick, one of the Directors of Chicago District Pipeline Company, is also a Vice-President and Director of Natural Gas Pipe Line Company, and a Director of Natural Gas Investment Company.

Section 8a of "An Act concerning public utilities", in force July 1, 1921, as amended, provides (Par. 2):

> "The Commission shall have jurisdiction over affiliated interests having transactions, other than owner-

ship of stock and receipt of dividends thereon, with public utilities under the jurisdiction of the Commission to the the extent of access to all accounts and records of such affiliated interests relating to such transactions, including access to accounts and records of joint or general expenses, any portion of which may be applicable to such transactions; and to the extent of authority to require such reports with respect to such transactions to be submitted by such affiliated interests, as the Commission may prescribe. For the purpose of this section th phrase 'affiliated interests' means:

"* * * (c) Every corporation, 10 percentum or more of whose voting capital stock is owned by any person or corporation owning 10 percentum or more of the voting capital stock of such public utility, or by any person or corporation in any such chain of successive ownership of 10 percentum or more of voting capital stock; * * * (f) Every corporation which has one or more elective officers, or one or more directors in common with such public utility; * * *"

Therefore, the Commission having considered the evidence which has up to now been introduced in this cause is of the opinion and finds:

(1) that it has jurisdiction of the subject matter of this proceeding and of the parties involved herein;

(2) that Chicago District Pipeline Company is a public utility under the jurisdiction of this Commission engaged in the business of supplying gas at wholesale to privately owned retailing public utility companies;

(3) that Natural Gas Pipe Line Company of America carries on certain transactions with said Chicago District Pipeline Company, to-wit: the sale of gas by said Natural Gas Pipe Line Company of America to Chicago District Pipeline Company under the terms of a contract dated July 25, 1931 and certain agreements supplemental thereto;

(4) that 26.62 per cent of the stock of said Natural Gas Pipe Line Company of America is owned by Natural Gas Investment Company; that 100 per cent of the stock of Chicago District Pipeline Company is owned by said Natural Gas Investment Company;

(5) that George F. Mitchell, President of Chicago District Pipeline Company, is President and Director of Natural Gas Investment Company and a Director of Natural Gas Pipe Line Company of America;

(6) that H. P. Sedwick is a Director of both Chicago District Pipeline Company and Natural Gas Investment Company and a Vice President and Director of Natural Gas Pipe Line Company of America;

(7) that by virtue of said common ownership of stock and said common directors said Natural Gas Pipe Line Company of America is an affiliate of Chicago District Pipeline Company within the meaning of Section 8a of "An Act concerning public utilities", in force July 1, 1921, as amended;

(8) that Ralph W. Gallagher, then Director of Continental Construction Company (the name of which was later changed to Natural Gas Pipe Line Company of America) was called as a witness by Chicago District Pipeline Company and that he testified as to estimated investment, expenses and earnings of the pipe line project; and that Frank L. Griffith, then Assistant Secretary of Chicago District Pipeline Company and Natural Gas Investment Company, now Director and Vice-President and Director, Vice-President and Comptroller of those companies, respectively, sponsored an exhibit purporting to show the earnings, expense and investment of Natural Gas Pipe Line Company of America as of February 29, 1932;

(9) that it is now imperative that the Commission be advised as to the actual experiences of said Natural Gas Pipe Line Company of America and Chicago District Pipeline Company in respect to the sale of gas to the latter by the former; that the said Natural Gas Pipe Line Company of America should be required to submit reports with respect to such transactions and that the said Natural Gas Pipe Line Company of America should make available to the Commission all accounts and records relating to said transactions, including any accounts and records, any portion of which may be applicable to such transactions.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that Natural Gas Pipe Line Company of America be, and the same is hereby, ordered and directed to file

forthwith in this proceeding on or before the Fifteenth (15th) day of March, A. D. 1937, a true and accurate report as to the cost of the property of said Natural Gas Pipe Line Company of America which is used in supplying natural gas to said Chicago District Pipeline Company and a statement of the income and expenses in connection with supplying gas to said Chicago District Pipeline Company, or to report to this Commission in substitution thereof, a true and accurate statement as to the cost of all of its property or properties used by it in the business of transporting and selling natural gas, together with a statement as to the income and expenses for such operations.

IT IS FURTHER ORDERED that the said Natural Gas Pipe Line Company of America make available for the examination of the Commission, or such of its officers, agents and employees as it may designate, all of its accounts and records relating to transactions between the said Natural Gas Pipe Line Company of America and the said Chicago District Pipeline Company, including all accounts and records as to joint or several expenses, any portion of which may be applicable to said transactions.

By order of the Commission at Springfield, Illinois, this Third (3rd) day of March, A. D. 1937.

(Signed) WILLIAM W. HART,
Secretary.

(SEAL)

APPENDIX B.

Provisions of the Illinois Public Utilities Act Referred to in the Foregoing Brief.

Section 8a (Chap. 111⅔, Ill. Rev. Stat. 1937, Sec. 8a):

§ 8a. JURISDICTION OVER STOCKHOLDERS, AFFILIATED INTERESTS—DISCLOSURE OF IDENTITY OF OWNER OF SUBSTANTIAL INTEREST

"(1) The commission shall have jurisdiction over holders of the voting capital stock of all public utilities under the jurisdiction of the commission to such extent as may be necessary to enable the commission to require the disclosure of the identity in respective interests of every owner of any substantial interest in such voting capital stocks. One per centum or more is a substantial interest, within the meaning of this subdivision.

"(2) The commission shall have jurisdiction over affiliated interests having transactions, other than ownership of stock and receipt of dividends thereon, with public utilities under the jurisdiction of the commission, to the extent of access to all accounts and records of such affiliated interests relating to such transactions, including access to accounts and records of joint or general expenses, any portion of which may be applicable to such transactions; and to the extent of authority to require such reports with respect to such transactions to be submitted by such affiliated interests, as the commission may prescribe. For the purposes of this section, the phrase 'affiliated interests' means:

"(a) Every corporation and person owning or holding, directly or indirectly, ten per centum or more of the voting capital stock of such public utility;

"(b) Every corporation and person in any chain of successive ownership of ten per centum or more of voting capital stock;

"(c) Every corporation, ten per centum or more of whose voting capital stock is owned by any person or

corporation owning ten per centum or more of the voting capital stock of such public utility, or by any person or corporation in any such chain of successive ownership of ten per centum or more of voting capital stock;

"(d) Every corporation, ten per centum or more of whose voting securities is owned, directly or indirectly, by such public utility;

"(e) Every person who is an elective officer or director of such public utility or of any corporation in any chain of successive ownership of ten per centum or more of voting capital stock;

"(f) Every corporation which has one or more elective officers or one or more directors in common with such public utility;

"(g) Every corporation or person which the commission may determine as a matter of fact after investigation and hearing is actually exercising any substantial influence over the policies and actions of such public utility even though such influence is not based upon stock holding, stockholders, directors or officers to the extent specified in this section.

"(h) Every person or corporation who or which the commission may determine as a matter of fact after investigation and hearing is actually exercising such substantial influence over the policies and actions of such public utility in conjunction with one or more other corporations or persons with which or whom they are related by ownership or blood relationship or by action in concert that together they are affiliated with such public utility within the meaning of this section even though no one of them alone is so affiliated.

"Provided, however, that no such person or corporation shall be considered as affiliated within the meaning of this section if such person or corporation is otherwise subject to the jurisdiction of the commission or such person or corporation shall not have had transactions or dealings other than the holding of stock and the receipt of dividends thereon with such public utility during the two-year period next preceding.

"(3) No management, construction, engineering, supply, financial or similar contract and no contract or arrangement for the purchase, sale, lease or

exchange of any property or for the furnishing of any service, property or thing, hereafter made with any affiliated interest, as hereinbefore defined, shall be effective unless it shall first have been filed with and approved by the commission. If it be found by the commission, after investigation and a hearing, that any such contract is not in the public interest, the commission is hereby authorized to disapprove such contract; and for the purposes of computing expense of operation in any rate proceeding, all payments under any such contract or arrangement not so filed, or so disapproved or in excess of the amount determined by the commission to be reasonable shall be deemed not to have been paid or charged to operating expenses. Every contract or arrangement not approved by the commission as provided for in this section shall be void.

"(4) The commission shall have authority by general rules applicable alike to all public utilities affected thereby, to waive the filing and necessity of approval of contracts and arrangements described in subparagraph (3) of this section, where the total obligation to be incurred under or by reason of such contract or arrangement shall not be in excess of five hundred dollars ($500). Provided, however, that if the commission, after a hearing, finds that any public utility is abusing such general rule and thereby evading the purposes of subparagraph (3) hereof, the commission shall have power to require such public utility to thereafter file and receive the commission's approval upon all contracts and arrangements described in subparagraph (3) of this section, regardless of amount, and said general rule herein referred to shall remain in full force and effect as to all other public utilities. (1921, June 29, Laws 1921, p. 702, art. I, § 8a, added 1933, July 8, Laws 1933, p. 841, § 1.)

Sections 60 and 62 (Chap. 111-2/3 Ill. Rev. Stat. 1937, Secs. 64 and 66):

"§64. INVESTIGATIONS AND HEARINGS:

"The Commission, or any commissioner, assistant commissioner, or officer of the Commission designated by the Commission, shall have power to hold investigations, inquiries and hearings concerning any mat-

ters covered by the provisions of this Act, or by any other Acts, relating to public utilities subject to such rules and regulations as the Commission may establish. In the conduct of any investigation, inquiry or hearing neither the Commission nor any commissioner, assistant commissioner or officer of the Commission shall be bound by the technical rules of evidence, and no informality in any proceeding or in the manner of taking testimony before the Commission, any commissioner, assistant commissioner or an officer of the Commission shall invalidate any order, decision, rule or regulation made, approved, or confirmed by the Commission. All hearings conducted by the Commission shall be open to the public.

"Each commissioner, each assistant commissioner, the secretary of the Commission, and every officer of the Commission designated by it to hold any inquiry, investigation or hearing, shall have the power to administer oaths and affirmations, certify to all official acts, issue subpoenas, compel the attendance and testimony of witnesses, and the production of papers, books, accounts and documents.

"Hearings shall be held either by the Commission or by one or more commissioners, or assistant commissioners. All evidence presented at hearings held by the Commission or under its authority shall become a part of the records of the Commission. In all cases in which the Commission bases any action on reports of investigation or inquiries not conducted as hearings, such reports shall be made a part of the records of the Commission. (1921, June 29, Laws 1921, p. 702, art. V, § 60.)"

"§ 66. ATTENDANCE OF WITNESSES—PRODUCTION OF PAPERS—DEPOSITIONS:

"All subpoenas issued under the terms of this Act may be served by any person of full age. The fees of witnesses for attendance and travel shall be the same as fees of witnesses before the circuit courts of this State, such fees to be paid when the witness is excused from further attendance, when the witness is subpoenaed at the instance of the Commission, or any commissioner or assistant commissioner: and the disbursements made in the payment of such fees shall

be audited and paid in the same manner as are other expenses of the Commission. Whenever a subpoena is issued at the instance of a complainant, respondent, or other party to any proceeding before the Commission, the Commission may require that the cost of service thereof and the fee of the witness shall be borne by the party at whose instance the witness is summoned, and the Commission shall have power, in its discretion, to require a deposit to cover the cost of such service and witness fees and the payment of the legal witness fee and mileage to the witness when served with subpoena. A subpoena issued as aforesaid shall be served in the same manner as a subpoena issued out of a court of record.

"Any person who shall be served with a subpoena to appear and testify, or to produce books, papers, accounts or documents, issued by the Commission or by any commissioner, assistant commissioner or officer of the Commission, in the course of an inquiry, investigation or hearing conducted under any of the provisions of this Act, and who refuse or neglect to appear, or to testify, or to produce books, papers, accounts and documents relevant to said inquiry, investigation or hearing as commanded in such subpoena, shall be guilty of a misdemeanor.

"Any circuit court of this State, or any judge thereof either in term time or vacation, upon application of the Commission, or a commissioner, assistant commissioner or officer of the commission, may, in his discretion, compel the attendance of witnesses, the production of books, papers, accounts and documents, and the giving of testimony before the Commission, or before any such commissioner, assistant commissioner, or officer, by an attachment for contempt or otherwise, in the same manner as production of evidence may be compelled before said court.

"The Commission or a commissioner, assistant commissioner or officer of the Commission or any party may in any investigation or hearing before the Commission, cause the deposition of witnesses residing within or without the State to be taken in the manner prescribed by law for like depositions in civil actions in the courts of this State and to that end may com-

pel the attendance of witnesses and the production of papers, books, accounts and documents.

"The Commission may require, by order served on any public utility in the manner provided herein for the service of orders, the production within this State at such time and place as it may designate, of any books, accounts, papers or documents kept by any public utility operating within this State in any office or place without this State, or, at its option, verified copies in lieu thereof, so that an examination thereof may be made by the Commission or under its direction. (1921, June 29, Laws 1921, p. 702, art. V, § 62.)"

Section 63 (Chap. 111⅔ Ill. Rev. Stat. 1937, Sec. 67).

§67. RIGHT TO INSPECT BOOKS AND PROPERTY AND TO EXAMINE AGENTS OF PUBLIC UTILITIES.

"The Commission, each commissioner, assistant commissioner and each officer and employee of the Commission properly authorized thereby shall have the right, at any and all times to inspect the papers, books, accounts and documents, plant, equipment or other property of any public utility, and the Commission, each commissioner, assistant commissioner, and any officer of the Commission authorized to administer oaths shall have power to examine under oath any officer, agent or employee of such public utility in relation to any matter within the jurisdiction of the Commission. A person other than a commissioner, or assistant commissioner demanding such inspection shall produce under the seal of the Commission his authority to make such inspection. A written record of the testimony or statement so given under oath shall be made and filed with the Commission. Information so obtained shall not be admitted in evidence or used in any proceeding except in proceedings provided for in this Act.

"Any party to a proceeding before the Commission shall have the right to inspect the records of all hearings, investigations or inquiries conducted by or under the authority of the Commission, which may relate to the issues involved in such proceeding; and to submit suggestions as to other matters to be investigated or as to questions to be propounded. If the Commission is satisfied that such suggested investigation should

be made or such suggested questions answered, and that the information desired is within the power of either party to furnish, it shall enter an order requiring the investigation to be made or the questions to be answered, and upon failure or refusal to comply with such order, the Commission shall either refuse to grant the relief prayed for by the party refusing to comply, or may grant the relief prayed for by the opposing party against the party refusing to comply. (1921, June 29, Laws 1921, p. 702, art. V, §63.)"

Sections 76 *and* 77 (*Chap.* 111⅔ *Ill. Rev. Stat.* 1937, *Secs.* 80 *and* 81).

"§80. PENALTY FOR VIOLATION BY PUBLIC UTILITY, OR CORPORATION OTHER THAN A PUBLIC UTILITY, OF ACT OR ORDERS—SEPARATE OFFENSES:

"Any public utility or any corporation other than a public utility, which violates or fails to comply with any provisions of this Act, or which fails to obey, observe or comply with any order, decision, rule, regulation, direction, or requirement or any part or provision thereof, of the Commission, made or issued under authority of this Act, in a case in which a penalty is not otherwise provided for in this Act, shall, upon conviction, be punished by a fine of not less than five hundred dollars nor more than two thousand dollars for each and every offense.

"Every violation of the provisions of this Act or of any order, decision, rule, regulation, direction or requirement of the Commission, or any part or portion thereof by any corporation or person, is a separate and distinct offense and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense.

"In construing and enforcing the provisions of this Act relating to penalties, the act, omission, or failure of any officer, agent, or employee of any public utility acting within the scope of his official duties or employment, shall in every case be deemed to be the act, omission, or failure of such public utility. (1921, June 29, Laws 1921, p. 702, art. V, §76.)

§81. PERSONS VIOLATING ACT OR ORDERS—PENALTY:

"Every person who, either individually, or acting as an officer, agent, or employee of a public utility or of a

corporation other than a public utility, violates or fails to comply with any provisions of this Act, or fails to observe, obey or comply with any order, decision, rule, regulation, direction or requirement, or any part or portion thereof, of the Commission, made or issued under authority of this Act, or who procures, aids or abets any public utility in its violation of this Act or in its failure to obey, observe or comply with this Act or any such order, decision, rule, regulation, direction, or requirement, or any part or portion thereof, in a case in which a penalty is not otherwise provided for in this Act, is guilty of a misdemeanor, and shall, upon conviction, be punished by a fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment. (1921, June 29, Laws 1921, p. 702, art. V, §77.)

APPENDIX C.

Distribution of the Stock of the Several Corporations Mentioned in This Brief.

Chicago District Pipeline Company is an Illinois corporation engaged in the sale, transportation and delivery of natural gas within the State of Illinois. This corporation purchases gas from the appellant at points near Joliet, Illinois. Its sole customers in Illinois are Public Service Company of Northern Illinois; Western United Gas and Electric Company; and The Peoples Gas Light and Coke Company. Gas purchased from appellant is delivered to these distributing companies by a system of pipelines. All of the capital stock of the Chicago District Pipeline Company prior to September 1, 1931 was held by Insull Son & Co. Inc., and since September 1, 1931 all or substantially all of said stock has been held by Natural Gas Investment Company.

Commonwealth Edison Company is an Illinois corporation engaged in the manufacture, sale and distribution of electrical energy to industrial, commercial and domestic consumers in the City of Chicago. The stock of Commonwealth Edison Company is not closely held, nor is it controlled by the same person, persons or interests that control any of the other corporations named in this appendix.

Commonwealth Subsidiary Corporation is an investment company organized under the laws of the State of Illinois. All of the outstanding capital stock is held by Commonwealth Edison Company.

Insull, Son & Co. Inc., is a bankrupt investment and holding company organized under the laws of the State of Illinois. All or substantially all of its stock was held by Insull Utility Investments, Inc.

Insull Utility Investments, Inc., was an investment and holding company organized under the laws of the State of Illinois. This company is now bankrupt. Its stock was not closely held, but the company was controlled by Samuel Insull, his family and business associates.

Natural Gas Investment Company is an investment and holding company organized under the laws of the State of Illinois, whose outstanding capital stock is held by the following named corporations in the amounts indicated:

Peoples Gas Subsidiary Corporation, an Illinois corporation 79.54%
Commonwealth Subsidiary Corporation, an Illinois corporation 4.28%
Public Service Company of Northern Illinois, an Illinois corporation 16.18%

Natural Gas Pipeline Company of America, appellant, is a Delaware corporation, organized in 1930, engaged in the sale, transportation and delivery of natural gas from the Panhandle area in Texas to distributors and industrial consumers of natural gas in the states of Kansas, Nebraska, Iowa and Illinois, by means of a system of pipelines and pumping stations. The outstanding capital stock of appellant at the times hereinafter mentioned was and is held by the following corporations in the amounts indicated, viz.:

	Distribution on July 25, 1931	Distribution on December 31, 1935	Present Distribution
Insull Son & Co., Inc., an Illinois corporation	26.63%	0.00%	0.00%
Cities Service Company, a Delaware corporation	26.63%	26.63%	26.63%
Natural Gas Investment Company, an Illinois corporation.....	0.00%	26.63%	26.63%
The Texas Corporation, a Delaware corporation	17.58%	17.58%	17.58%
Standard Oil Company, a New Jersey corporation.....	26.62%	13.31%	13.31%
Southwestern Development Company, a Colorado corporation....	0.00%	13.31%	13.31%
Columbian Carbon Company, a Delaware corporation.....	2.53%	2.53%	2.53%

Peoples Gas Subsidiary Corporation is an investment company organized under the laws of the State of Illinois. The capital stock of this company is owned by The Peoples Gas Light and Coke Company.

Public Service Company of Northern Illinois is an Illinois corporation engaged in the manufacture, sale and distribution of electric energy and gas to commercial, industrial and domestic consumers in that part of Illinois lying adjacent to and north, south and west of the City of Chicago. A majority of the stock of Public Service Company of Northern Illinois is owned by Commonwealth Edison Company.

Western United Gas and Electric Company is an Illinois corporation engaged in the manufacture, sale and distribution of gas and electric energy to industrial, commercial and domestic consumers in a certain area lying west of the City of Chicago. A majority of the stock of Western United Gas and Electric Company is owned by Commonwealth Subsidiary Corporation.

The Peoples Gas Light and Coke Company is an Illinois corporation engaged in the manufacture, sale and distribution of gas to industrial, commercial and domestic consumers in the City of Chicago. The stock is not closely held nor is it owned or controlled by the same interest or interests that own or control any of the other corporations named in this appendix.